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A COLLECTION OF ALL
CASES AFFECTING RAILROADS OF EVERY KIND, DECIDED BY THE COURTS OF APPELLATE JURISDICTION

IN THE
UNITED STATES, ENGLAND AND CANADA.

EDITED BY
THOMAS J. MICHIE.

VOLUME X.
NEW SERIES.

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GEO. R. B. MICHIE & CO., PUBLISHERS.

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**AMERICAN AND ENGLISH
CORPORATION CASES New Series**

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**EDITED BY
THOMAS J. MICHIE,**

**ASSISTED BY
BASIL JONES AND A. R. YELLOTT.**

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THE
AMERICAN AND ENGLISH
RAILROAD CASES

NEW SERIES

VOLUME X

SMYTH, ATTORNEY GENERAL, *et al.*

v.

AMES *et al.*

SAME *v.* SMITH *et al.*

SAME *v.* HIGGINSON *et al.*

(*U. S. Supreme Court, March 7, 1898.*)

State Regulation of Rates—Equity Jurisdiction of Federal Courts.—A person entitled to sue in a federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in such court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action.

Same—Suit by Stockholders—Constitutionality of Statute.—Stockholders of a railroad corporation may invoke the equity jurisdiction of a federal court to enjoin state officers from enforcing certain rates of transportation upon the ground that the statute prescribing them is repugnant to the constitution of the United States.

Same—Parties—Officers or State.—Such actions are not against the state within the meaning of eleventh amendment of the constitution of the United States, but against its officers.

Same—Union Pacific Railway Company.—The Union Pacific Railway Company is subject to the authority of states to fix and regulate the rates of transportation to be charged by railroads within their limits, congress not having as yet exercised its reserved power to fix the rates to be charged by such road.

Railroads—Constitutional Rights.—A railroad is a person within the meaning of the fourteenth amendment of the constitution of the United States; and no state has authority to deprive them of their property without due process of law.

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Same—Rates.—And, consequently, no state has authority to establish unreasonably low rates for railroad transportation.

Same.—And the question whether or not a railroad corporation is deprived of its property by such means cannot be so conclusively determined by the legislature of a state, or by regulations adopted under its authority, that the matter may not become the subject of inquiry in a federal court.

Same—Comparison of Rates.—In such an inquiry, comparisons between the rates of two states are of little value, unless all the elements that enter into the problem are presented.

Same—Question of Profits.—A state cannot require a railroad to be operated without profit within its limits merely upon the ground that the company earns sufficient on its interstate business to give it just compensation in respect of its entire line on all its business, interstate and domestic.

Adequacy of Rates—Basis of Calculations.—The basis of all calculations as to the reasonableness of rates to be charged by a railroad company must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses are all matters for consideration, and there may be other matters to be considered in this connection; but rates are not necessarily too low because they do not enable a railroad company to meet operating expenses, pay the interests on its obligations, and declare a dividend to stockholders.

Same—Constitutionality of Statute.—The act of 1893 of Nebraska, if enforced in these suits, would have deprived the railroad companies of their right to just compensation secured to them by the constitution of the United States.

APPEALS by defendants from the circuit court of the United States for the District of Nebraska. *Affirmed.*

John L. Webster and *Wm. J. Bryan*, for appellants.
J. M. Woolworth and *James C. Carter*, for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

The appellees in the first of the above cases were the plaintiffs below, and are citizens of Massachusetts, and stockholders of the Union Pacific Railway Company. They sued on behalf of themselves and all others similarly situated. The defendants are the Union Pacific Railway Company; the St. Joseph & Grand Island Railroad Company, the Omaha & Republican Valley Railroad Company, and

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the Kansas City & Omaha Railroad Company,—corporations of Nebraska under the control of the Union Pacific Railway Company; certain persons, citizens of Nebraska, who hold the offices, respectively, of attorney general, secretary of state, auditor of public accounts, state treasurer, and commissioner of public lands and buildings, and constitute the state board of transportation; and James C. Dahlman, Joseph W. Edgerton, and Gilbert L. Laws, citizens of Nebraska, and secretaries of that board. By a supplemental bill in the same suit, certain persons, receivers of the Union Pacific Railway Company, were made defendants.

In the second case, some of the plaintiffs, appellees here, are subjects of Queen Victoria, while the others are citizens of Massachusetts. They are all stockholders of the Chicago & Northwestern Railroad Company, a corporation organized and existing under the laws of Illinois, Wisconsin, and Iowa, and have sued in that capacity on behalf of themselves and all others similarly situated. The defendants are the Chicago & Northwestern Railroad Company; the Fremont, Elkhorn & Missouri Valley Railroad Company, a Nebraska corporation, and the Chicago, St. Paul, Minneapolis & Omaha Railway Company, a corporation organized under the laws of Minnesota and Nebraska, both under the control of the Chicago & Northwestern Railroad Company; and the above officers constituting the state board of transportation, as well as those holding the position of secretaries of that board.

In the third case, the appellees Henry L. Higginson and others, citizens of Massachusetts, were the plaintiffs below. They sued on behalf of themselves and all other stockholders of the Chicago, Burlington & Quincy Railroad Company, a corporation organized and existing under the laws of Illinois and Iowa, and whose lines west of the Missouri river are known as the Burlington & Missouri Road. The defendants are the Chicago, Burlington & Quincy Railroad Company,

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the persons composing the Nebraska state board of transportation, and the secretaries of that board.

For the sake of brevity, the Union Pacific Railway Company will be called the "Union Pacific Company," the St. Joseph & Grand Island Railroad Company the "St. Joseph Company," the Omaha & Republican Valley Railroad Company the "Omaha Company," the Kansas City & Omaha Railroad Company the "Kansas City Company," the Fremont, Elkhorn & Missouri Valley Railroad Company the "Fremont Company," the Chicago, St. Paul, Minneapolis & Omaha Railway Company the "St. Paul Company," and the Chicago, Burlington & Quincy Railroad Company the "Burlington Company."

Each of these suits was brought July 28, 1893, and involves the constitutionality of an act of the legislature of Nebraska approved by the governor April 12, 1893, and which took effect August 1, 1893. It was an act "to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the state of Nebraska, and to provide penalties for the violation of this act." Acts Neb. 1893, c. 24; Comp. St. Neb. 1893, c. 72, art. 12. The act is referred to in the record as "House Roll 33."

Prior to the enactment of that statute, the legislature passed an act to regulate railroads, prevent unjust discrimination, provide for a board of transportation, and define its duties, and repeal articles 5 and 8 of chapter 72, entitled "Railroads," of the Revised Statutes of Nebraska, and all acts and parts of acts in conflict therewith,—the same being chapter 60 of the Session Laws of 1887, and now article 8 of chapter 72 of the Compiled Statutes of Nebraska of 1893. By that act the attorney general, secretary of state, auditor of public accounts, state treasurer, and commissioner of public lands and buildings were constituted a board of transportation, with power to appoint three secretaries to assist in the performance of its duties, and with authority to inquire into the management of the busi-

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ness of all common carriers subject to its provisions, and obtain from them the full and complete information necessary to enable the board to perform its duties, and carry out the objects for which it was created. It was also provided that, for the purposes of the act, the board should have power to require the attendance and testimony of witnesses and the production of all books, papers, contracts, agreements, and documents relating to any matter under investigation, and to that end could invoke the aid of any of the district courts or of the supreme court of the state; and that any court of competent jurisdiction in which such inquiry was carried on could, in case of contumacy or refusal to obey a subpoena issued to any common carrier or person subject to the provisions of the act, issue an order requiring such carrier or other person to appear before the board (and produce books and papers, if ordered), and give evidence touching the matter in question; and any failure to obey the order was punishable by the court as for contempt. The claim that any testimony or evidence might tend to criminate the person giving evidence would not excuse the witness from testifying, but such evidence or testimony could not be used against him on the trial of any criminal proceeding.

The power to enact the statute whose validity is now assailed—that is, the above statute of August 1, 1893, regulating railroads, classifying freights, fixing reasonable maximum rates, etc., in Nebraska—was referred by counsel to the general legislative power of the state, as well as to the fourth section of article 11 of the state constitution which provides: “Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state. The liability of rail-

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road corporations as common carriers shall never be limited.”

By the first section of that statute it is declared that, except as therein otherwise provided, its provisions shall apply to all railroad corporations, railroad companies, and common carriers engaged in Nebraska in the transportation of freight by railroad therein, and also to shipments of property made from any point within the state to any other point within its limits. That section provides: “The term ‘railroad,’ as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation, receiver, trustee or other person operating a railroad whether owned or operated under contract, agreement, lease or otherwise, and the term ‘transportation’ shall include all instrumentalities of shipment or carriage, and the term ‘railroad corporation’ contained in this act shall be deemed and taken to mean all corporations, companies or individuals, now owning or operating, or which may hereafter own or operate, any railroad, in whole or in part, in this state, and the provisions of this act, except as in this act otherwise provided, shall apply to all persons, firms and companies, and to all associations of persons, whether incorporated or otherwise, that shall do business as common carriers of freight upon any of the lines of railway in this state, the same as to railroad corporations herein mentioned.” Section 1.

The second section provides that all freight or property to be transported by any railroad company or companies mentioned in the first section, “from any point in the state of Nebraska to any other point in said state, shall be classified as hereinafter in this section provided, and any other or different classification of freight, which would raise the rates on class or commodity of freights above the rates prescribed in this act, except as hereinafter otherwise provided, is prohibited and declared to be unlawful. The classification established by this act shall be known as the ‘Nebraska Classification.’ Freights shall be billed at

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the actual weight unless otherwise directed in the classification—twenty thousand pounds shall be a carload, and all excessive weights shall be at the same rate per hundred pounds, except in carloads of light and bulky articles, and unless otherwise specified in the classification. When the classification makes an article 'released' or 'owner's risk,' the same at carrier's risk will be the next highest rate higher, unless otherwise provided in the classification. Articles rated first class, 'released' or owner's risk, if taken at 'carrier's risk,' will be $1\frac{1}{2}$ times first class unless otherwise provided in the classification. All articles carried according to this classification at 'owner's risk' of fire, leakage, damage or breakage must be so receipted for by agents of the railroad, and so considered by owners and shippers. Signing a release contract by a shipper shall not release the railroad company for loss or damages caused by carelessness or negligence of its employees." Section 2.

Following this section, in the body of the statute, are tables of the classification of freights.

The third section is in these words: "That each of the railroads in the state of Nebraska shall charge for the transportation of freight from any point in said state to any other point in said state, no higher or greater rate of charge than is by this act fixed as the reasonable maximum rate for the distance hauled, and the reasonable maximum rates for the transportation of freight by railroad from any point in the state of Nebraska to any other point in said state are declared and established to be as hereinafter in this section fixed for the distance named, and any higher or greater rate for the distance hauled than that herein fixed and established is prohibited and declared to be unlawful; and the reasonable maximum rate herein fixed and established shall be known as the 'Nebraska Schedule of Reasonable Maximum Rates.'" Section 3.

Here follow tables of the rates prescribed by the statute.

That the full scope of the act may appear, its remaining sections are given as follows:

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“Sec. 4. All railroads or parts thereof which have been built in this state since the 1st day of January, 1889, or may be built before the 31st day of December, 1899, shall be exempt from the provisions of this act until the 31st day of December, 1899.

“Sec. 5. Whenever any railroad company or companies in this state shall in a proper action show by competent testimony that the schedule of rates prescribed by the act are unjust and unreasonable, such railroad or railroads shall be exempt therefrom as hereinafter provided. All such actions shall be brought before the supreme court, in the name of the railroad company or companies bringing the same, and against the state of Nebraska, and upon the hearing thereof, if the court shall become satisfied that the rates herein prescribed are unjust in so far as they relate to the railroad bringing the action [it] may issue their [its] order directing the board of transportation to permit such railroad to raise its rates to any sum in the discretion of the board ; provided, that in no case shall the rates so raised be fixed at a higher sum than that charged by such railroad on the first day of January, 1893. Whenever any railroad company in this state shall claim the benefit of the provisions of this section it shall be the duty of such railroad company to show to the court all matters pertaining to the management thereof, and if it shall appear that said railroad company is operating branch lines of railroad in connection with its main line, and all included in one system, then, in that case, it shall be the duty of the railroad company to show to the court upon which branch or branches, or upon which portion of such system the schedule of rates prescribed in this act is unjust and unreasonable, and only such portions shall be exempted from the provisions thereof : provided, that in no case shall a railroad company be allowed to pool the earnings of all the lines operated under one management, where more than one line is so operated, for the purpose of lowering the general average.

“Sec. 6. That the board of transportation is hereby

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empowered and directed to reduce the rates on any class or commodity in the schedule of rates fixed in this act, whenever it shall seem just and reasonable to a majority of said board so to reduce any rate; and said board of transportation is hereby empowered and directed to revise said classification of freight as hereinbefore in this act established, whenever it shall appear to a majority of said board just and reasonable to revise said classification: provided, that said board of transportation shall never change the classification in the act established, so that by such change or classification the rates on any freight will become higher or greater than in this act fixed. When any reduction of rates or revision of classification shall be made by said board, it shall be the duty of said board to cause notice thereof to be published two successive weeks in some public newspaper, published in the city of Lincoln, in this state, which notice shall state the date of the taking effect of such change of rate or classification, and said change of rate or classification so made by the said board and published in said notice, shall take effect at the time so stated in said notice.

“Sec. 7. That articles not enumerated in said classification in section two of this act established, not rated in said schedule of rates in section three of this act, shall be classed with analogous articles in said classification, and where there is any conflict between said classification and said schedule of maximum rates, said rates shall govern.

“Sec. 8. That in case any common carrier subject to the provisions of this act shall do, or cause to be done, or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby, for all damages sustained in consequence of any such violation of the provisions of this act together with cost of suit and a reasonable counsel or attorney's fee, to be fixed by the court in which the same is heard on appeal or otherwise, which

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shall be taxed and collected as part of the costs in the case: provided, that, in all cases demand in writing on said common carrier shall be made for the money damages sustained before suit is brought for recovery under this section, and that no suit shall be brought until the expiration of fifteen days after such demand.

“Sec. 9. That in case any common carrier subject to the provisions of this act shall do or cause to be done, or permit to be done, any act, matter or thing in this act, prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall, upon conviction thereof, be fined in any sum not less than one thousand dollars, nor more than five thousand dollars for the first offense; and for the second offense not less than five thousand dollars, nor more than ten thousand dollars; and for the third offense, not less than ten thousand dollars, nor more than twenty thousand dollars; and for every subsequent offense and conviction thereof, shall be liable to a fine of twenty-five thousand dollars: provided, that in all cases under this act either party shall have the right of trial by jury.

“Sec. 10. All acts and parts of acts inconsistent herewith are repealed.”

These cases were heard at the same time, and in the one in which the Union Pacific Company, the St. Joseph Company, the Omaha Company, and the Kansas City Company were defendants it was adjudged in the circuit court—MR. JUSTICE BREWER presiding—as follows: “That the said railroad companies, and each and every of them, and said receivers, be perpetually enjoined and restrained from making or publishing a schedule of rates to be charged by them, or any or either of them, for the transportation of freight on and over their respective roads in this state from one point to another therein, whereby such rate shall be reduced to those prescribed by the act of the legislature of this state, called in the bill filed therein, ‘House Roll 33,’ and entitled ‘An act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged

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for the transportation of freight upon each of the railroads in the state of Nebraska, and to provide penalties for the violation of this act,' approved April 12, 1893, and below those now charged by said companies, or either of them, or their receivers, or in any wise obeying, observing, or conforming to the provisions, commands, injunctions, and prohibitions of said alleged act; and that the board of transportation of said state and the members and secretaries of said board be in like manner perpetually enjoined and restrained from entertaining, hearing, or determining any complaint to it against said railroad companies, or any or either of them or their receivers, for or on account of any act or thing by either of said companies or their receivers, their officers, agents, servants, or employees, done, suffered, or omitted, which may be forbidden or commanded by said alleged act, and from instituting or prosecuting, or causing to be instituted or prosecuted, any action or proceeding, civil or criminal, against either of said companies or their receivers for any act or thing done, suffered or omitted, which may be forbidden or commanded by said act, and particularly from reducing its present rates of charges for transportation of freight to those prescribed in said act, and that the attorney general of this state be in like manner enjoined from bringing, aiding in bringing, or causing to be brought, any proceeding by way of injunction, *mandamus*, civil action, or indictment against said companies, or either of them, or their receivers, for or on account of any action or omission on their part commanded or forbidden by the said act; and that a writ of injunction issue out of this court, and under the seal thereof, directed to the said defendants, commanding, enjoining, and restraining them as hereinbefore set forth, which injunction shall be perpetual save as is hereinafter provided. And it is further declared, adjudged, and decreed that the act above entitled is repugnant to the constitution of the United States, forasmuch as by the provisions of said act the said defendant railroad com-

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panies may not exact for the transportation of freight from one point to another within this state charges which yield to the said companies, or either of them, reasonable compensation for such services. It is further ordered, adjudged, and decreed that the defendant members of the board of transportation of said state may hereafter, when the circumstances have changed so that the rates fixed in the said act shall yield to the said companies reasonable compensation for the services aforesaid, apply to this court by supplemental bill or otherwise, as they may be advised, for a further order in that behalf. It is further ordered, adjudged, and decreed that the plaintiffs recover of the said defendants their costs to be taxed by the clerk."

The above decree was in accordance with the prayer for relief. A similar decree was rendered in each of the other cases.

The present appeals were prosecuted by the defendants constituting the state board of transportation, as well as by the defendants who are secretaries of that board.

The first question to be considered is one common to all the cases. While it was not objected at the argument that there had been any departure from the ninety-fourth equity rule, it was contended that the plaintiffs had an adequate remedy at law, and that the circuit court of the United States, sitting in equity, was therefore without jurisdiction. This objection is based upon the fifth section of the Nebraska statute, authorizing any railroad company to show, in a proper action brought in the supreme court of the state, that the rates therein prescribed are unreasonable and unjust, and, if that court found such to be the fact, to obtain an order upon the board of transportation permitting the rates to be raised to any sum in the discretion of that board, provided that in no case should they be fixed at a higher sum than was charged by the company on the 1st day of January, 1893. This section, it is contended, took from the circuit court of the United States its equity jurisdiction in respect to the rates

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prescribed and required the dismissal of the bills.

We cannot accept this view of the equity jurisdiction of the circuit courts of the United States.

The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a federal court is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a state may be administered by the circuit courts of the United States. Case of Broderick's Will, 21 Wall. 503, 520; Holland v. Challen, 110 U. S. 15, 24, 3 Sup. Ct. 495; Dick v. Foraker, 155 U. S. 404, 415, 15 Sup. Ct. 124; Bardon v. Improvement Co., 157 U. S. 327, 330, 15 Sup. Ct. 650; Rich v. Braxton, 158 U. S. 375, 405, 15 Sup. Ct. 1006. But if the case, in its essence, be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper circuit court of the United States whenever jurisdiction attaches by reason of diverse citizenship, or upon any other ground of federal jurisdiction. Payne v. Hook, 7 Wall. 425, 430; McConihay v. Wright, 121 U. S. 201, 205, 7 Sup. Ct. 940. A party, by going into a national court, does not, this court has said, lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality; that the wise policy of the constitution gives him a choice of tribunals. Davis v. Gray, 16 Wall. 203, 221; Cowley v. Railroad Co., 159 U. S. 569, 583, 16 Sup. Ct. 127. So, “whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to

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maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory, invaded by unauthorized acts of its own officers, to suits for redress in its own courts." *Reagan v. Trust Co.*, 154 U. S. 362, 391, 14 Sup. Ct. 1047; *Mississippi Mills v. Cohn*, 150 U. S. 202, 204, 14 Sup. Ct. 75; *Cowles v. Mercer Co.*, 7 Wall. 118; *Lincoln Co. v. Luning*, 133 U. S. 529, 10 Sup. Ct. 363; *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712; *Chicot Co. v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. 695; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977.

In these cases the plaintiffs, stockholders in the corporations named, ask a decree enjoining the enforcement of certain rates for transportation upon the ground that the statute prescribing them is repugnant to the constitution of the United States. Under the principles which in the federal system distinguish cases in law from those in equity, the circuit court of the United States, sitting in equity, can make a comprehensive decree covering the whole ground of controversy, and thus avoid the multiplicity of suits that would inevitably arise under the statute. The carrier is made liable not only to individual persons for every act, matter, or thing prohibited by the statute, and for every omission to do any act, matter, or thing required to be done, but to a fine of from \$1,000 to \$5,000 for the first offense, from \$5,000 to \$10,000 for the second offense, from \$10,000 to \$20,000 for the third offense, and \$25,000 for every subsequent offense. The transactions along the line of any one of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree, according to the prayer of the bills, would avoid a multiplicity of suits, and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for

Same—Suit by
Stockholders—
Constitutionality
of Statute.

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transportation. The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency, and determine once for all, and without a multiplicity of suits, matters that affect not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the *quasi* public corporation by which such highway is maintained.

Another question of a preliminary character must be here noticed. The answer of the officers of the state in each case insists that the real party in interest is the state, and that these suits are, Same—Parties—
Officers or State. in effect, suits against the state, of which the circuit court of the United States cannot take jurisdiction consistently with the eleventh amendment of the constitution of the United States. This point is, perhaps, covered by the general assignments of error, but it was not discussed at the bar by the representatives of the state board. It would therefore be sufficient to say that these are cases of which, so far as the plaintiffs are concerned, the circuit court has jurisdiction not only upon the ground of the diverse citizenship or alienage of the parties, but upon the further ground that, as the statute of Nebraska under which the state board of transportation proceeds is assailed as being repugnant to rights secured to the plaintiffs by the constitution of the United States, the cases may be regarded as arising under that instrument. But, to prevent misapprehension, we add that within the meaning of the eleventh amendment of the constitution the suits are not against the state, but against certain individuals charged with the administration of a state enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a state from enforcing an unconstitutional

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enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of that amendment. *Pennoyer v. McConnaughy*, 140 U. S. 1, 10, 11 Sup. Ct. 699; *In re Tyler*, 149 U. S. 164, 190, 13 Sup. Ct. 785; *Scott v. Donald*, 165 U. S. 58, 68, 17 Sup. Ct. 265; *Tindal v. Wesley*, 167 U. S. 204, 220, 17 Sup. Ct. 770.

An important question is presented that relates only to the Union Pacific Company. That company is a corporation formed by the consolidation of several companies under the authority of acts of congress, one of the constituent companies being the Union Pacific Railroad Company, incorporated by the act of July 1, 1862 (12 Stat. 489, c. 120.) *U. S. v. Union Pac. Ry. Co.*, 160 U. S. 1, 6, 16 Sup. Ct. 190. Neither that company nor the Union Pacific Railroad Company is named in the Nebraska statute, but the statute is interpreted by the state board of transportation as embracing the present defendant corporation. It is contended that the state is without power to fix or limit the rates that the Union Pacific Company may charge for the transportation of freight on its lines between points within Nebraska. This contention rests: (1) Upon the provisions of the acts of congress showing that the Union Pacific Railroad Company was created for the accomplishment of national objects, namely, to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores of the United States; (2) upon the eighteenth section of the above act of July 1, 1862 (12 Stat. 489, 497), c. 120, providing that, "whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs and the furnishing and running and managing of said road, shall exceed ten per centum upon its cost, exclusive of the five per centum to be paid to the United States, congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the

Same—Union
Pacific Railway
Company.

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same by law." The argument is that congress by this enactment has reserved to itself exclusive control of rates, interstate and local, to be charged on the Union Pacific Railroad. As this view, if maintained, would require an affirmance of the decree so far as the Union Pacific Company is concerned, whether the Nebraska statute of 1893 be constitutional or not as to the other railroad corporations, it cannot properly be passed without examination.

In *Reagan v. Trust Co.*, 154 U. S. 413, 14 Sup. Ct. 1060, the question arose whether the Texas & Pacific Railway Company, a corporation organized under the laws of the United States, was subject to the laws of Texas with respect to rates for transportation wholly within that state. The ground upon which exemption from state control was there asserted by the company was that it received all its franchises from congress, including the franchise to charge and collect tolls. This court, conceding, for the purposes of that case, that congress had power to remove the corporation in all its operations from state control, held that the act creating it did not show an intention upon the part of congress to exempt it from the duty to conform to such reasonable rates for local transportation as the state might prescribe, and that the enforcement by the state of reasonable rates for such transportation would not disable the corporation from performing the duties and exercising the powers imposed upon it by congress. The court said: "By the act of incorporation congress authorized the company to build its road through the state of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the state to other points also within the state, and that in so doing it would be engaged in a business, control of which is nowhere by the federal constitution given to congress. It must have been known that, in the nature of things, the control of that business would be exercised by the state, and, if it deemed that the interests of the nation and the discharge of the duties required on behalf of

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the nation from this corporation demanded exemption in all things from state control, it would unquestionably have expressed such intention in language whose meaning would be clear. Its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the state, it intended that it should be subjected to the ordinary control exercised by the state over such business. Without, therefore, relying at all upon any acceptance by the railroad corporation of the act of the legislature of the state, passed in 1873, in respect to it, we are of opinion that the Texas & Pacific Railway Company is, as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates, and other police regulations."

This conclusion, as may be observed from the opinion, was based in part upon the reasoning in *Thomson v. Railroad Co.*, 9 Wall. 579, and in *Railroad Co. v. Peniston*, 18 Wall. 5, in which cases it was held that the property of certain railroad companies was not exempt from state taxation by reason alone of the fact that they were organized under acts of congress for the accomplishment of national objects, and that the imposition of such taxes was not in a constitutional sense, an obstruction to the exercise of the powers of the general government, nor an interference with the discharge of the duties required of the companies by their charters.

In the present case the question is more difficult of solution by reason of the declaration in the above act of July 1, 1862 (no similar declaration being made in the act incorporating the Texas & Pacific Railway Company), that congress may reduce the rates of fare on the Union Pacific Railroad if unreasonable in amount, and may fix and establish the same by law whenever the net earnings of the entire road and telegraph, ascertained upon a named basis, should exceed 10 per centum upon its cost, exclusive of the 5 per centum to be paid to the United States.

Undoubtedly, congress intended by that act to re-

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serve such power as was necessary to prevent the corporation from exacting rates that were unreasonable. But this is not equivalent to a declaration that the states through which the railroad might be constructed should not regulate rates for transportation begun and completed within their respective limits.

It cannot be doubted that the making of rates for transportation by railroad corporations along public highways, between points wholly within the limits of a state, is a subject primarily within the control of that state. And it ought not to be supposed that congress intended that, so long as it forebore to establish rates on the Union Pacific Railroad, the corporation itself could fix such rates for transportation as it saw proper, independently of the right of the states through which the road was constructed to prescribe regulations for transportation beginning and ending within their respective limits. On the contrary, the better interpretation of the act of July 1, 1862, is that the question of rates for wholly local business was left under the control of the respective states through which the Union Pacific Railroad might pass, with power reserved to congress to intervene under certain circumstances, and fix the rates that the corporation could reasonably charge and collect. Congress not having exerted this power, we do not think that the national character of the corporation constructing the Union Pacific Railroad stands in the way of a state prescribing rates for transporting property on that road wholly between points within its territory. Until congress, in the exercise either of the power specifically reserved by the eighteenth section of the act of 1862, or its power under the general reservation made of authority to add to, alter, amend, or repeal that act, prescribes rates to be charged by the railroad company, it remains with the states through which the road passes to fix rates for transportation beginning and ending within their respective limits.

We are now to inquire whether the Nebraska statute is repugnant to the constitution of the United States.

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By the fourteenth amendment it is provided that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. That corporations are persons within the meaning of this amendment is now settled. *Santa Clara Co. v. Southern Pac. R. Co.*, 118 U. S. 394, 396, 6 Sup. Ct. 1132; *Railroad Co. v. Gibbes*, 142 U. S. 386, 391, 12 Sup. Ct. 255; *Railway Co. v. Ellis*, 165 U. S. 150, 154, 17 Sup. Ct. 255. What amounts to deprivation of property without due process of law, or what is a denial of the equal protection of the laws, is often difficult to determine, especially where the question relates to the property of a *quasi* public corporation, and the extent to which it may be subjected to public control. But this court, speaking by CHIEF JUSTICE WAITE, has said that, while the state has power to fix the charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by valid contract, or unless what is done amounts to a regulation of foreign or interstate commerce, such power is not without limit; and that, "under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward, neither can it do that which in law amounts to the taking of private property for public use without just compensation, or without due process of law." *Railroad Commission Cases*, 116 U. S. 307, 325, 331, 6 Sup. Ct. 334, 348, 349, 388, 391, 1191. This principle was recognized in *Dow v. Beidelman*, 125 U. S. 680, 689, 8 Sup. Ct. 1028, and has been reaffirmed in other cases. In *Banking Co. v. Smith*, 128 U. S. 174, 179, 9 Sup. Ct. 47, it was said that the power of the state to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits—in the absence of any provision in the charter of the company constituting a contract vesting it with authority over those matters—was "subject to the limitation that the carriage is not required without reward, or upon condi-

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tions amounting to the taking of property for public use without just compensation ; and that what is done does not amount to a regulation of foreign or interstate commerce." In *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 458, 10 Sup. Ct. 462, 702, it was said : "If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the constitution of the United States ; and, in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws." In *Railway Co. v. Wellman*, 143 U. S. 339, 344, 12 Sup. Ct. 400, the court, in answer to the suggestion that the legislature had no authority to prescribe maximum rates for railroad transportation, said that "the legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates." In *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, the court, while sustaining the power of New York by statute to regulate charges to be exacted at grain elevators and warehouses in that state, took care to state, as a result of former decisions, that such power was not one "to destroy or a power to compel the doing of the services without reward, or to take private property for public use without just compensation or without due process of law."

In *Reagan v. Trust Co.*, 154 U. S. 362, 399, 14 Sup. Ct. 1047, which involved the validity of certain rates for freights and passengers prescribed by a railroad commission established by an act of the legislature of Texas, this court, after referring to the above cases, said : "These cases all support the proposition that, while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial

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power, and a part of judicial duty, to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws, which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must, in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property legally acquired and legally held. It was, therefore, within the competency of the circuit court of the United States for the Western district of Texas, at the instance of the plaintiff, a citizen of another state, to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission. Indeed, it was in so doing only exercising a power expressly named in the act creating the commission."

So, in *Railway Co. v. Gill*, 156 U. S. 649, 657, 15 Sup. Ct. 484 it was said that "there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in

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the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws." In *Road Co. v. Sanford*, 164 U. S. 578, 584, 594, 595, 597, 17 Sup. Ct. 198, which involved the validity of a state enactment prescribing rates of toll on a turnpike road, the court said: "A statute which, by its necessary operation compels a turnpike company, when charging only such tolls as are just to the public, to submit to such further reduction of rates as will prevent it from keeping its road in proper repair, and from earning any dividends whatever for stockholders, is as obnoxious to the constitution of the United States as would be a similar statute relating to the business of a railroad corporation having authority, under its charter, to collect and receive tolls for passengers and freight." And in *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U. S. 226, 241, 17 Sup. Ct. 581, it was held that "a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is upon principle and authority wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

In view of the adjudications these principles must be regarded as settled:

1. A railroad corporation is a person within the meaning of the fourteenth amendment declaring that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Railroads—Con-
stitutional Rights.

2. A state enactment, or regulations made under the

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authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as, under all the circumstances, is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would, therefore, be repugnant to the fourteenth amendment of the constitution of the United States.

Same—Rates.

3. While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry.

Same.

The cases before us directly present the important question last stated.

Before entering upon its examination, it may be observed that the grant to the legislature in the constitution of Nebraska of the power to establish maximum rates for the transportation of passengers and freight on railroads in that state has reference to "reasonable" maximum rates. These words strongly imply that it was not intended to give a power to fix maximum rates without regard to their reasonableness. Be this as it may, it cannot be admitted that the power granted may be exerted in derogation of rights secured by the constitution of the United States, or that the judiciary may not, when its jurisdiction is properly invoked, protect those rights.

What are the considerations to which weight must be given when we seek to ascertain the compensation that a railroad company is entitled to receive, and a prohibition upon the receiving of which may be fairly deemed a deprivation by legislative decree of property without due process of law? Undoubtedly, that ques-

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tion could be more easily determined by a commission composed of persons whose special skill, observation, and experience qualifies them to so handle great problems of transportation as to do justice both to the public and to those whose money has been used to construct and maintain highways for the convenience and benefit of the people. But, despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it, will contend that a state enactment is in harmony with that law simply because the legislature of the state has declared such to be the case, for that would make the state legislature the final judge of the validity of its enactment, although the constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding. Article 6. The idea that any legislature, state or federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions, and the liberty which is enjoyed under them, depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land.

We turn now to the evidence in the voluminous record before us for the purpose of ascertaining whether—looking at the cases in the light of the facts as they existed when the decrees were rendered—the Nebraska

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statute, if enforced, would, by its necessary operation, have deprived the companies, whose stockholders and bondholders here complain, of the right to obtain just compensation for the services rendered by them.

The first and most important contention of the plaintiffs is that, if the statute had been in force during any one of the three years preceding its passage, the defendant companies would have been compelled to use their property for the public substantially without reward, or without the just compensation to which it was entitled. We think this mode of calculation for ascertaining the probable effect of the Nebraska statute upon the railroad companies in question is one that may be properly used.

The conclusion reached by the circuit court was that the reduction made by the Nebraska statute in the rates for local freight was so unjust and unreasonable as to require a decree staying the enforcement of such rates against the companies named in the bill. *Ames v. Railway Co.*, 64 Fed. 165, 189. That conclusion was based largely upon the figures presented by Mr. Dilworth while he was a secretary of the state board of transportation, as well as a defendant and one of the solicitors of the defendants in these causes. He was a principal witness for that board. His general fairness and his competency to speak of the facts upon which the question before us depends are apparent on the record. He stated that the average reduction made by the statute on all the "commodities of local rates" was 29.50 per cent., and this estimate seems to have been accepted by the parties as correct. He estimated that the percentage of operating expenses on local business would exceed the percentage of operating expenses on all business by at least 10 per cent., and that it might go as high as 20 per cent., or higher. And this view is more than sustained by the evidence of witnesses possessing special knowledge of railroad transportation and of the cost of doing local business as compared with what is called "through business." Indeed, one of those witnesses states that the cost of carrying local freight is four times as much as the cost of through

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freight per ton per mile ; another, that the cost of the short haul is "reasonably double the long haul." If due regard be had to the testimony,—and we have no other basis for our judgment,—we are not permitted to place the extra cost of local business at less than 10 per cent. greater than the percentage of the cost of all business.

In answer to questions propounded to him by the defendants constituting the state board of transportation, Mr. Dilworth stated that he had prepared himself with an estimate showing the number of tons of freight commonly spoken of as "local freight" hauled on the respective railways in Nebraska, and the amount received by the railway companies by way of tariff on tons of freight hauled, including through as well as local freight, and was qualified to speak as to the amount received by the companies for both passengers and freight within the state, and the reduction that would take place in rates under the statute in question. He presented various tables showing the results of his investigations. One is known as "Exhibit 4," and is an "estimate of local business, and the effect of house roll 33" on the Burlington, St. Paul, Fremont, Union Pacific, Omaha, St. Joseph, and Kansas City Companies for the year 1892. Another is called "Exhibit 19," and is a like estimate in respect of the same companies for the years 1891 and 1893. Another is known as "Exhibit 20," and shows "Tons carried, tonnage per mile, and percentage of expenses for the years ending June 30, 1891, 1892, and 1893 (Nebraska)." These exhibits are as follows* :

It may be here stated that the words in these exhibits, "number of tons hauled locally," refer to freight that started and ended in the state. The words in Exhibit 4, "amount received for freight hauled in Nebraska, including through and local," and the like words in Exhibit 19 refer not only to freight starting and ending in the state, but to all freight hauled by the railroad company in Nebraska, regardless of its desti-

*See pages 28 and 29.

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EXHIBIT 4.
Estimate of Local Business and the Effect of House Roll 33 on the Following Named Railroads :

1892.	Number of tons hauled locally.	Average amount re- ceived for each ton hauled.	Total am't received for tons hauled locally.	Total am't of reduction caused by H. R. 33.	Amount re- ceived from passenger business.	Amount re- ceived for freight haul- ed in Ne- braska, in- cluding lo- cal and through.	Total am't realized on all business done in the state by H. R. 33.	Per cent. of reduction on all business done in the state by H. R. 33.
Burlington Co.....	574,653	\$2.15416	\$1,237,884	\$365,175	\$2,369,714	\$5,538,766	\$7,908,242	.044
St. Paul Co.....	65,762	1.87089	123,033	36,294	263,458	472,051	763,509	.047
Fremont Co.....	158,350	2.12633	336,714	99,310	598,219	1,495,468	2,093,687	.047
Union Pacific Co.....	192,865	2.06498	398,262	117,487	977,264	4,284,793	5,262,057	.022
Omaha Co.....	63,999	1.38026	88,335	26,043	305,668	955,626	1,261,294	.022
St. Joseph Co....	39,657	.63051	31,004	8,836	71,083	216,395	287,478	.030
Kansas City Co.....	10,823	.61261	6,630	1,889	41,123	125,530	166,653	.011

EXHIBIT 19.
Estimate of Local Business and the Effect of House Roll 33 on the Following Named Railroads for the Years
Ending June 30, 1891 and 1893.

1891.	Number of tons hauled locally.	Average amount re- ceived for each ton hauled.	Total am't received for tons hauled locally.	Total am't of reduction caused by H. R. 33.	Amount re- ceived from passenger business.	Amount re- ceived for freight haul- ed in Ne- braska, in- cluding lo- cal and through.	Total am't realized on all business done in the state by H. R. 33.	Per cent. of reduction on all business done in the state by H. R. 33.
Burlington Co.....	538,824	\$1.98	\$1,066,871	\$314,726	\$2,321,983	\$3,942,078	\$6,264,061	.05
St. Paul Co.....	64,496	1.72	110,933	37,725	225,264	506,470	731,734	.044
Fremont Co.....	141,056	2.47	348,408	102,780	876,583	1,969,242	2,845,825	.036
Union Pacific Co.....	152,028	1.83	278,211	82,072	1,509,331	3,791,849	5,301,108	.015
Omaha Co.....	61,448	1.23	75,581	22,296	311,130	580,834	891,964	.025
St. Joseph Co.....	25,078	.87	21,817	6,245	86,036	178,529	264,565	.024
Kansas City Co.....	8,743	.77	6,732	1,985	41,837	67,946	109,783	.018
1893.								
Burlington Co.....	583,294	2.13	1,242,416	366,512	2,581,564	5,973,356	8,554,920	.042
St. Paul Co.....	78,753	1.81	142,542	42,049	267,535	650,109	917,644	.045
Fremont Co.....	177,804	2.26	424,437	125,208	816,239	2,237,044	3,053,283	.041
Union Pacific Co.....	220,061	1.88	413,714	122,045	1,551,877	4,313,204	5,865,081	.020
Omaha Co.....	68,237	1.18	80,519	23,753	332,497	887,616	1,220,113	.019
St. Joseph Co.....	50,452	.67	33,802	9,971	99,396	263,516	362,912	.027
Kansas City Co.....	15,484	.61	9,445	2,786	41,667	135,824	177,491	.015

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EXHIBIT 20.

Tons Carried, Tonnage per Mile, and Percentage of Expenses for Years Ending June 30, 1891, 1892, and 1893 (Nebraska).

Name of Road.	No. of tons carried locally	No. of tons of interstate freight carried	No. of tons of local freight carried 1 mile.	No. of tons of interstate freight carried 1 mile.	Total No. of tons local and interstate carried 1 mile.	Total No. of passengers local and interstate carried 1 mile.	Percentage of expenses to earnings.
1891.							
Burlington Co.....	538,824	1,448,229	73,075,310	106,415,962	269,491,272	69,594,747	66.24
St. Paul Co.....	64,496	228,671	10,267,118	36,397,629	46,664,747	7,403,263	70.78
Fremont Co.....	141,056	654,400	21,863,680	101,644,999	123,508,679	24,898,729	49.87
Union Pacific Co....	152,028	1,908,045	28,908,124	362,966,694	391,874,818	66,072,597	68.94
Omaha Co.....	61,448	409,270	4,579,104	30,499,041	35,078,145	10,295,137	120.26
St. Joseph Co.....	25,078	178,169	1,497,658	10,640,979	12,138,637	2,308,918	96.44
Kansas City Co....	8,743	78,694	403,751	3,634,082	4,037,833	912,210	99.54
1892.							
Burlington Co.....	574,653	1,996,437	91,139,965	316,552,193	407,692,158	70,038,243	64.23
St. Paul Co.....	65,762	264,403	11,028,287	44,321,384	55,349,671	8,833,405	65.96
Fremont Co.....	158,350	846,312	24,069,200	128,425,903	152,495,103	21,874,987	70.71
Union Pacific Co....	192,865	1,882,112	42,970,322	419,300,773	462,271,095	56,926,269	56.44
Omaha Co.....	63,999	628,351	4,659,127	45,745,647	50,404,774	10,058,442	93.12
St. Joseph Co.....	39,657	303,550	2,005,851	15,355,015	17,360,866	2,472,538	74.23
Kansas City Co....	10,823	194,089	481,515	8,635,016	9,116,531	864,030	75.19
1893.							
Burlington Co.....	583,294	2,221,005	93,703,675	357,131,753	450,925,428	83,091,418	65.51
St. Paul Co.....	78,753	279,218	12,848,551	45,554,417	58,402,968	9,074,093	64.58
Fremont Co.....	187,804	800,158	26,855,972	114,511,328	141,367,300	23,209,212	53.66
Union Pacific Co....	220,061	2,068,568	45,948,736	431,949,561	477,898,297	63,422,117	58.51
Omaha Co.....	68,237	683,868	4,257,988	42,706,297	46,964,285	11,028,131	94.14
St. Joseph Co.....	50,452	337,647	2,774,860	18,576,845	21,351,705	2,834,169	62.05
Kansas City Co....	15,484	205,725	658,534	8,750,126	9,408,660	875,415	76.50

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nation or origin,—that is, “freight that begins in the state and goes out of the state, freight that begins out of the state and comes into the state, and freight which begins and ends in the state.” The words, “per cent. of reduction on all the business done in the state by house roll 33,” in Exhibits 4 and 19, mean the percentage of the total amount of all business, passenger and freight, done in the state, whatever its origin or destination, and do not indicate the percentage of reduction on local business when considered alone. It should be stated also that the words, “percentage of expenses to earnings,” in Exhibit 20, refer to all business, through and local, done by the railroad company within the state. Mr. Dilworth, as we have seen, testified that, if the local business alone were considered, the percentage of expenses to earnings upon such business would be at least 10 per cent. more than the general percentage of expenses to earning on all business, both through and local. It is important here to note that his estimates are of business from July 1st to the succeeding June 30th. So that, when allusion is made presently to his estimates for 1891, 1892, and 1893, it will be understood to refer to the years ending the 30th days of June 1891, 1892, and 1893, respectively.

From July 1, 1890, to June 30, 1891, as shown by Exhibit 20, the percentage of expenses to earnings on all business on the Burlington road was 66.24; on the St. Paul road 70.78, on the Fremont road 49.87, on the Union Pacific road 68.94, on the Omaha road 120.26, on the St. Joseph road 96.44, and on the Kansas City road 99.54.

From July 1, 1891, to June 30, 1892, as shown by the same exhibit, the percentage of expenses to earnings on all business on the Burlington road was 64.23, on the St. Paul road 65.96, on the Fremont road 70.71, on the Union Pacific road 56.44, on the Omaha road 93.12, on the St. Joseph road 74.23, and on the Kansas City road 75.19; and

From July 1, 1892, to June 30, 1893, as shown by the same exhibit, the percentage of expenses to earnings on all business on the Burlington road was 65.51,

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on the St. Paul road 64.58, on the Fremont road 53.66, on the Union Pacific road 58.51, on the Omaha road 94.14, on the St. Joseph road 62.05, and on the Kansas City road 76.50.

In view of the reduction of 29.50 in rates prescribed by the statute and of the extra cost of doing local business, as compared with other business, what do these facts show ?

Take the case of the Burlington road from July 1, 1890, to June 30, 1891. Looking at the entire business done on it during that period within the limits of the state, we find that the percentage of operating expenses to earnings on all business—which, as stated, does not include the extra cost of local business—was 66.24. Add to this the extra cost of local business, estimated at least 10 per cent., and the result is that, under the rates charged during the period stated, the cost to the Burlington Company of earning \$100 would have been \$76.24. Now, if the reduction of 29½ per cent. made by the act of 1893 had been in force prior to July 1, 1891, the company would have received \$70.50 as against \$100 for the same service, showing that in that year the operating expenses would have exceeded the earnings by \$5.74 in every \$100 of the amount actually received by it.

By like calculations, it will appear that each of the railroad companies would have conducted their local business at a loss during the periods stated, except that in the year ending June 30, 1891, and in the year ending June 30, 1893, the earnings of the Fremont Company, and in the years ending the 30th days of June, 1892 and 1893, respectively, the earnings of the Union Pacific Company would have slightly exceeded their operating expenses.

Under the rates prescribed by the act of 1893, the cost to the respective companies of local business in Nebraska would have exceeded the earnings for the years ending June 30, 1891, 1892, and 1893, respectively, in every \$100 of the amount actually received, as follows : To the Burlington Company, by \$5.74, \$3.73, and \$5.01 ; to the St. Paul Company, by \$10.28, \$5.46,

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and \$4.08 ; to the Omaha Company, by \$59.76, \$32.62, and \$33.64 ; to the St. Joseph Company, by \$35.94, \$13.73, and \$1.55 ; and to the Kansas City Company, by \$39.04, \$14.69, and \$16. The cost to the Union Pacific Company for the year ending June 30, 1891, of its local business, under the rates prescribed by the statute of 1893, would have caused a loss of \$8.44 in every \$100 of the amount actually received.

In order to show these results at a glance the following table is inserted upon the basis of 100 as representing the amounts actually charged and received by the respective railroad companies for the years given :

NAME.	Cost v. percentage of all business.	Extra cost of local business.	Total cost of local business.	Earnings as reduced by act of 1893.	Loss.	Gain.
1891.						
Burlington Co.....	66.24	10	76.24	70.50	5.74	10.63
St. Paul Co.....	70.78	10	80.78	70.50	10.28	
Fremont Co.....	49.87	10	59.87	70.50	.....
Union Pacific Co.....	68.94	10	78.94	70.50	8.44	
Omaha Co.....	120.26	10	130.26	70.50	59.76	
St. Joseph Co.....	96.44	10	106.44	70.50	35.94	
Kansas City Co.....	99.54	10	109.54	70.50	39.04	
1892.						
Burlington Co.....	64.23	10	74.23	70.50	3.73	4.06
St. Paul Co.....	65.96	10	75.96	70.50	5.46	
Fremont Co.....	70.71	10	80.71	70.50	10.21	
Union Pacific Co.....	56.44	10	66.44	70.50	.....
Omaha Co.....	93.12	10	103.12	70.50	32.62	
St. Joseph Co.....	74.23	10	84.23	70.50	13.73	
Kansas City Co.....	75.19	10	85.19	70.50	14.69	
1893.						
Burlington Co.....	65.51	10	75.51	70.50	5.01	6.84 1.99
St. Paul Co.....	64.58	10	74.58	70.50	4.08	
Fremont Co.....	53.66	10	63.66	70.50	.....
Union Pacific Co.	58.51	10	68.51	70.50	.....
Omaha Co.....	94.14	10	104.14	70.50	33.64	
St Joseph Co.....	62.05	10	72.05	70.50	1.55	
Kansas City Co.....	76.50	10	86.50	70.50	16.00	

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There are other views of the case suggested by the above exhibits and table, which show the same results.

In the year ending June 30, 1891, under the rates then in force, the Burlington Company received \$1,066,871 for tons carried locally. If the business had been done under the rates prescribed by the act of 1893, it would have received $29\frac{1}{2}$ per cent. less; that is, only \$752,145, or \$314,726 less than it did receive. The percentage of expenses to earnings, including the extra cost of local business, was 76.24; that is, it cost \$813,382 to earn \$1,066,871. So that the difference between \$813,382 and \$752,145 shows that, if the rates prescribed by the statute of 1893 had been in force during the year ending June 30, 1891, the amount received would have been less than the operating expenses of the Burlington Company by \$61,237.

During the year ending June 30, 1892, the same company received for tons carried locally \$1,237,884. If the act of 1893 had been in force, it would have received, because of the reduced rates prescribed by that act, only \$872,709,—less by \$365,175 than it did receive. The percentage of expenses to earnings, including the extra cost of local business, was 74.23; that is, the \$872,709 would have been earned at a cost of \$918,881. So that, under the rates prescribed by the act of 1893, the loss during the period named would have been \$46,172.

During the year ending June 30, 1893, that company received \$1,242,416 for tons carried locally, whereas under the $29\frac{1}{2}$ per cent. reduction prescribed by the statute of that year it would have received only \$875,905; that is, less by \$366,512 than it did receive. The percentage of its expenses to earnings in that year, including the extra cost of local business, was 75.51; that is, under the statutory rates \$875,905 would have been earned at a cost of \$938,147, which would have been a loss of \$62,243.

By the same mode of calculation, it will be found that, if the statute of 1893 had been enforced during the years ending the 30th days of June, 1891, 1892, and

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1893 respectively, the other companies would have lost—that is, their expenses would have exceeded their earnings—during those years by the following amounts: The St. Paul Company, \$11,403, \$6,716, and \$5,814; the Fremont Company, \$34,377 for the year ending June 30, 1892; the Union Pacific Company, \$23,480 for the year ending June 30, 1891; the Omaha Company, \$45,166, \$28,813, and \$27,085; the St. Joseph Company, \$7,840, \$4,256, and \$523; and the Kansas City Company, \$2,627, \$974, and \$1,510; while the earnings of the Union Pacific Company would have exceeded its expenses for the years ending the 30 days of June, 1892 and 1893, respectively, by \$16,170 and \$8,234, and those of the Fremont Company by \$37,037 and \$29,036 for the years ending the 30th days of June, 1891 and 1893, respectively.

These results will be seen in the following table, based upon the above exhibits, and assuming that 10 per cent. was the very lowest amount of the extra cost of business beginning and ending in the state:*

Counsel for the appellants contend that the railroad companies in Nebraska derived a profit from their local tonnage of nearly 100 per cent. over and above operating expenses. This contention is based upon the evidence given by William Randall, freight and ticket agent as well as auditor of the Burlington road in Nebraska, on his first examination as a witness. He then stated that the earnings of the company for the year 1892—meaning for the year beginning January 1, 1892—upon freight starting and ending within the state were \$1,853,036.59, and that the operating expenses, including taxes, on that business were \$972,183.70. These figures, counsel say, show that “there was a clear profit, over operating expenses, including taxes, of nearly one hundred per cent. on the local business of the Burlington Company in 1892.” But counsel overlook the fact that upon his second examination Mr. Randall stated that his first figures were not correct, and that the operating expenses on local busi-

*See page 35.

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NAME OF ROAD.	Total amt. received for tons carried lo- cally.	Total amt. of reduc- tion by act of 1893, 29½ per cent.	What would have been received under rates fixed by act of 1893.	Amount to be deduct- ed to pay expenses (reckoned by per cent of cost of all busi- ness).	Amount to be taken out of earnings to pay 10 per cent. extra cost of lo- cal busi- ness.	Total ex- pense of local business.	Gain.	Loss.
1891.								
Burlington Co...	\$1,066,871	\$314,726	\$752,145	\$706,695	\$106,687	\$813,382	.....	\$61,237
St. Paul Co.....	110,933	32,725	78,208	78,518	11,093	89,611	.....	11,403
Fremont Co.....	348,408	102,780	245,628	173,751	34,840	208,591	\$37,037	.....
Union Pacific Co.....	278,211	82,072	196,139	191,798	27,821	219,619	.....	23,480
Omaha Co	75,581	22,296	53,285	90,893	7,558	98,451	.....	45,166
St. Joseph Co.....	21,817	6,436	15,381	21,040	2,181	23,221	.....	7,840
Kansas City Co.....	6,732	1,985	4,747	6,701	673	7,374	.....	2,627
1892.								
Burlington Co.....	1,237,884	365,175	872,709	795,093	123,788	918,881	.....	46,172
St. Paul Co.....	123,033	36,294	86,739	81,152	12,303	93,455	.....	6,716
Fremont Co.....	336,714	99,330	237,384	238,090	33,671	271,761	.....	34,377
Union Pacific Co....	398,262	117,487	280,775	224,779	39,826	264,605	16,170	.....
Omaha Co.....	88,335	26,058	62,277	82,257	8,833	91,090	.....	28,813
St. Joseph Co.....	31,004	9,146	21,858	23,014	3,100	26,114	.....	4,256
Kansas City Co.....	6,630	1,955	4,674	4,985	663	5,648	.....	974
1893.								
Burlington Co.....	1,242,416	366,512	875,904	813,906	124,241	938,147	.....	62,243
St. Paul Co.....	142,542	42,049	100,493	92,053	14,254	106,307	.....	5,814
Fremont Co	424,437	125,208	299,229	227,750	42,443	270,193	29,036	.....
Union Pacific Co.....	413,714	122,045	291,669	242,064	41,371	283,435	8,234	.....
Omaha Co.....	80,519	23,753	56,766	75,800	8,051	83,851	.....	27,085
St. Joseph Co.....	33,802	9,971	23,831	20,974	3,380	24,354	523
Kansas City Co	9,445	2,786	6,659	7,225	944	8,169	1,510

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business of the company ; that is, all its business, passenger and freight, interstate and domestic. If it be found upon investigation that the profits derived by a railroad company from its interstate business alone are sufficient to cover operating expenses on its entire line, and also to meet interest, and justify a liberal dividend upon its stock, may the legislature prescribe rates for domestic business that would bring no reward, and be less than the services rendered are reasonably worth ? Or must the rates for such transportation as begins and ends in the state be established with reference solely to the amount of business done by the carrier wholly within such state, to the cost of doing such local business, and to the fair value of the property used in conducting it, without taking into consideration the amount and cost of its interstate business, and the value of the property employed in it ? If we do not misapprehend counsel, their argument leads to the conclusion that the state of Nebraska could legally require local freight business to be conducted even at an actual loss, if the company earned on its interstate business enough to give it just compensation in respect of its entire line and all its business, interstate and domestic. We cannot concur in this view. In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the state has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business,

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nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the state that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the state,—can have no application where the state is without authority over rates on the entire line, and can only deal with local rates, and make such regulations as are necessary to give just compensation on local business.

Touching the suggestion that the reduction on rates made by the state law was reasonable, if regard be had to all the business, through and local, done in the state by the railroad companies, the circuit court said:

“But again, as Mr. Dilworth testified, the average reduction on local rates caused by house roll 33 is $29\frac{1}{2}$ per cent. The tariff which was in force at the time of the passage of this act had been, for some three or more years, fixed by the voluntary action of the railroad companies, and the reduction of $29\frac{1}{2}$ per cent. was from their rates. It must be remembered that these roads are competing roads; that competition tends to a reduction of rates,—sometimes, as the history of the country has shown, below that which affords any remuneration to those who own the property. Can it be possible that any business so carried on can suffer a reduction of $29\frac{1}{2}$ per cent. in its receipts without ruin? What would any business man, engaged in any business of a private character, think of a compulsory reduction of his receipts to the amount of $29\frac{1}{2}$ per cent? The effect of this testimony is not destroyed by the table offered of the percentage of reduction on the total amount of business done by these companies in the state as follows:

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B. & M. R.....	4.2 per cent.
C., St. P., M. & O.....	4.5 per cent.
F., E. & M. B.....	4.1 per cent.
Union Pacific.....	2.0 per cent.
O. & R. V.....	1.9 per cent.
St. J. & G. I.....	2.7 per cent.
K. C. & O.....	1.5 per cent.

—“For such a table only indicates, as is further shown by defendants’ Exhibit 4, how small a proportion of the total amount of business done in the state comes from purely local freight. Nor is it weakened by any comparison between the amount of reduction and the total receipts from all business. It may be, as stated by counsel, that the annual earnings of the Chicago, Burlington & Quincy Company are \$27,916,128, and that the total amount of reduction caused by this house roll 33 is only \$365,175. It may be that the capital stock of the company is \$76,407,500, and that \$365,175 distributed among the stockholders may not be for any of them a great sum; but the entire earnings of the C., B. & Q. are more than twenty times the receipts from local freight in Nebraska; and to reduce such earnings by twenty times \$365,175 would make a startling difference in their amount. The fact that the state of Nebraska can reach only one-twentieth of the total earnings gives it no greater right to make a reduction in respect to that one-twentieth than it would have had it the power over the total earnings, and attempted in them a like per cent. of reduction. If it would be unreasonable to reduce the total earnings of these roads 29½ per cent. it is at least *prima facie* equally unreasonable to so reduce any single fractional part of such earnings.”

It appears, from what has been said, that if the rates prescribed by the act of 1893 had been in force during the years ending June 30, 1891, 1892, and 1893, the Fremont Company, in the years ending June 30, 1891, and June 30, 1893, and the Union Pacific Company, in the years ending June 30, 1892, and June 30, 1893, would each have received more than enough to pay

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operating expenses. Do those facts affect the general conclusion as to the probable effect of the act of 1893? In the discussion of this question the plaintiffs contended that a railroad company is entitled to exact such charges for transportation as will enable it at all times not only to pay operating expenses, but also to meet the interest regularly accruing upon all its outstanding obligations, and justify a dividend upon all its stock; and that to prohibit it from maintaining rates or charges for transportation adequate to all those ends will deprive it of its property without due process of law, and deny to it the equal protection of the laws. This contention was the subject of elaborate discussion, and, as it bears upon each case in its important aspects, it should not be passed without examination.

In our opinion, the broad proposition advanced by counsel involves some misconception of the relations between the public and a railroad corporation. It is unsound, in that it practically excludes from consideration the fair value of the property used, omits altogether any consideration of the right of the public to be exempt from unreasonable exactions, and makes the interests of the corporation maintaining a public highway the sole test in determining whether the rates established by or for it are such as may be rightfully prescribed as between it and the public. A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the state. Such a corporation was created for public purposes. It performs a function of the state. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is under governmental control, though such control must be exercised with due regard to the guaranties for the protection of its property. *Olcott v. Supervisors*, 16 Wall. 678, 694; *Sinking Fund Cases*, 99 U. S. 700, 719; *Cherokee Nation v. Southern Kan. Ry. Co.*, 135 U. S. 641, 657, 10 Sup. Ct. 965. It cannot, therefore, be admitted that a railroad corpo-

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ration maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public, or the fair value of the services rendered, but, in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders.

If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds, and obligations, is not alone to be considered when determining the rates that may be reasonably charged. What was said in *Turnpike Co. v. Sandford*, 164 U. S. 578, 596, 597, 17 Sup. Ct. 198, is pertinent to the question under consideration. It was there observed: "It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent. upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. * * *

The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may

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not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant's turnpike upon payment of such tolls as, in view of the nature and value of the services rendered by the company, are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable."

A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges, and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may, by legislation, protect the people against unreasonable charges for the services rendered by it. It cannot be assumed that any railroad corporation, accepting franchises, rights, and privileges at the hands of the public, ever supposed that it acquired, or that it was intended to grant to it, the power to construct and maintain a public highway simply for its benefit, without regard to the rights of the public. But it is equally true that the corporation performing such public services, and the people financially interested in its business and affairs, have rights that may not be invaded by legislative enactment in disregard of the fundamental guaranties for the protection of property. The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it. How such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question. As said in the case last cited: "Each case must depend upon its special facts; and when a court without assuming itself to prescribe rates, is required

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to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. * * * The utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature, when exerting its general powers, is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just both to it and to the public."

Adequacy of Rates
—Basis of Calculations.

We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reason-

Same—Constitutionality of Statute.

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ably worth. But even upon this basis, and determining the probable effect of the act of 1893 by ascertaining what could have been its effect if it had been in operation during the three years immediately preceding its passage, we perceive no ground on the record for reversing the decree of the circuit court. On the contrary, we are of opinion that as to most of the companies in question there would have been, under such rates as were established by the act of 1893, an actual loss in each of the years ending June 30, 1891, 1892, and 1893; and that, in the exceptional cases above stated, when two of the companies would have earned something above operating expenses in particular years, the receipts or gains above operating expenses would have been too small to affect the general conclusion that the act, if enforced, would have deprived each of the railroad companies involved, in these suits of the just compensation secured to them by the constitution. Under the evidence, there is no ground for saying that the operating expenses of any of the companies were greater than necessary.

In concluding this opinion, it may not be inappropriate to say that the conclusions reached by us as to the effect of the Nebraska statute find some support in the report of the board of secretaries of the Nebraska board of transportation made in September, 1891, to the board itself, and signed by Mr. Dilworth and his colleagues. That report was made pursuant to a resolution of the board requiring the secretaries to prepare a statement of facts in reference to the rates of transportation in Nebraska. It contains a brief history of what it characterizes as "the controversy on the question of freight rates between the people and the railroads of the state," and embodies such facts, figures, and arguments as the secretaries gathered from both sides. The report says: "The present controversy between the people and the railroads of this state originally grew out of the question, not of rates or reduction of rates, but of control. The people, recognizing the railroads as common carriers, not entitled, under the state constitu-

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tion, to the same broad liberty of action in business that the individual citizen has wanted to control the roads. The roads, impatient of interference, wanted to control themselves, and manage their business in their own way." It further states: "We have given you in the foregoing a brief history of the rate matter as we have found it, and from that history, and from the evidence and reports on file in our office, we beg leave to submit in conclusion the following findings of fact: First. We find from the evidence and sworn statements and reports on file in our office, and from personal inspection, that the railroads in this state could not be duplicated for a less sum than \$30,000 per mile, taking into consideration their equipments and depot and terminal facilities." Here follow a mass of figures and calculations, and the report concludes: "We further find that the railroads are not in a condition to stand, nor do their earnings, figured on a basis cost of \$30,000 per mile, and not what they claim they cost, justify any cut in local rates of this state at the present time; and, further, that a reduction in the local rates in this state would increase the through rates to market for our grain, and would be a blow at the industry of the state. This last finding is fully established by the fact that the board of transportation reduced the local rates on hard coal 60 per cent., and yet the price to the consumer was not lowered, nor the price at the mines raised, which shows conclusively that the through rates must have been raised. In submitting this report, we have presented the facts and figures as we find them from evidence obtainable, from sworn reports now on file in our office. And we would respectfully recommend that no action be taken that will in any way jeopardize the interests of the producers of Nebraska, but that all interests be protected in the fullest manner possible, as provided by the foregoing findings."

To this report of the secretaries is appended the "Findings of the Board," from which we made this

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extract : “ After a careful and quite thorough investigation of the question of freight rates in Nebraska, which has occupied much time, and has taken a wide range, the state board of transportation has arrived at the conclusion that the rates now in force in this state cannot be generally reduced without doing violence to the business interests of the state, and at the same time injuring the shipping and producing classes. We have come to this conclusion, not by taking the cost of construction and equipments, nor the amount of stock and bonds issued per mile, but by making our computations upon the basis of what it would cost to duplicate the property at the present time. It has been our endeavor to deal fairly and justly with the question, and in arriving at a conclusion we have been governed only by the evidence, statements, and facts produced for our consideration. A candid examination and comparison of the figures presented to us in the unanimous report of the board of secretaries, in the opinion of this board, fully justifies the conclusion reached—that a general reduction of rates, as now in force over the state, is not practical at this time.”

So that we have the judgment of the state board of transportation as constituted in 1891, that a general reduction of rates could not then have been made without injury to the business of the state, to say nothing of the interests of those whose means were invested in railroad property. We are unable to find from the record before us that the situation in Nebraska had so changed in 1893 as to justify that being done in that year which it was not safe or just to do in 1891.

But it may be added that the conditions of business, so far as railroad corporations are concerned, have probably changed for the better since the decree below, and that the rates prescribed by the statute of 1893 may now afford all the compensation to which the railroad companies in Nebraska are entitled as between them and the public. In anticipation, perhaps, of such a change of circumstances, and the exceptional char-

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acter of the litigation, the circuit court wisely provided in its final decree that the defendant members of the board of transportation might "when the circumstances have changed so that the rates fixed in the said act of 1893 shall yield to the said companies reasonable compensation for the services aforesaid," apply to the court, by bill or otherwise, as they might be advised, for a further order in that behalf. Of this provision of the final decree the state board of transportation, if so advised, can avail itself. In that event, if the circuit court finds that the present condition of business is such as to admit of the application of the statute to the railroad companies in question, without depriving them of just compensation, it will be its duty to discharge the injunction heretofore granted, and to make whatever order is necessary to remove any obstruction placed by the decrees in these cases in the way of the enforcement of the statute.

Perceiving no error on the record in the light of the facts presented to the circuit court, the decree in each case must be affirmed.

It is so ordered.

McGhee v. Reynolds

McGHEE *et al.*

v.

REYNOLDS.

(*Supreme Court of Alabama, Feb. 1, 1898.*)

Wrongful Ejection from Car—Signing Bills of Exceptions—Special Judge.—Under the Code of Alabama of 1886 the judge of a circuit court before whom a cause is tried can sign a bill of exceptions on any day before the end of the term; and the fact that a special judge appointed under Acts 1894–95, p. 1135 is presiding at the time of such signing is immaterial.

Legal Conclusions.—Allegations in a complaint in an action for wrongful ejection from a car that defendants' conductor "willfully, violently and forcibly," ejected complainant from the car were statements of mere legal conclusions of the pleader.

Same—Void Tickets.*—A conductor has a right to eject a person from his car whose sole claim to be considered a passenger is by virtue of a ticket void on its face.

Cause of Action.—The complaint alleged, in substance, that complainant purchased from defendants a round-trip ticket, which entitled her to a return passage, provided she presented it to defendants' agent at the starting point of the return trip for his signature, and identified herself as its original owner to such agent; and that defendants' agent refused to sign the ticket though requested by complainant to do so; and that she, having presented such ticket for the inspection of the conductor, was wrongfully ejected from defendants' car. *Held*, that the refusal of defendants' agent to sign the ticket was a good cause of action in tort.

APPEAL by defendants from Morgan county circuit court. *Reversed.*

Humes, Sheffey & Speake, for appellants.

O. Kyle, for appellee.

HARALSON, J. 1. Even if the motion to strike from the transcript the pages which show the appointment of a special judge at the term of the court be not granted, it could not be allowed that Judge Speake, who tried this case, did not have the authority to sign the bill of excep-

Wrongful Ejection
from Car—Signing
Bills of Exceptions
—Special Judge.

*As to Ejection of Passenger Holding Defective Ticket, see *Western Maryland R. Co. v. Stocksdales*, (Md.), 4 Am. & Eng. R. Cas., N. S., 510, and *notes*, p. 515 *et seq.*

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tions. It appears he tried it in the earlier part of the term, which began on the second Monday in April, 1897. The governor, by virtue of the act approved February 18, 1895, providing "for the holding of regular terms of the circuit and chancery courts when the judge or chancellor fails to attend," etc. (Acts 1894-95, p. 1135), appointed the Hon. O. Kyle, as special judge to hold the court. The commission recites, that Judge Speake failed to appear. On the 8th of May, 1897, the day fixed by law for the adjournment of the court, as the order recites, Special Judge Kyle entered an order of adjournment, without day. On that day, presumably before the adjournment, Judge Speake signed the bill of exceptions in this case, and it was properly and legally signed. Code 1886, §§ 2760, 2761.

2. There is no misjoinder of causes of action in the amended counts of the complaint. The action is in tort against defendants for unlawfully ejecting the plaintiff as a passenger from their train, and not an action of *assumpsit* for the breach of a contract. The first count was in tort, and so were the three others added by way of amendment.

3. The first and third counts in the amended complaint set out no more in substance, when stripped of redundant and superfluous matter, which might have been stricken, than that the plaintiff purchased a ticket for a reward from defendants, at Decatur to Huntsville, which authorized her to travel thereon to Huntsville and return to Decatur; and after having traveled on it to Huntsville, she attempted to return to Decatur on defendants' cars, was not allowed to ride thereon, but was wrongfully ejected from the cars, by the conductor of defendants' train. The violation of duty complained of in these counts, is the illegal conduct of the conductor, in ejecting plaintiff from the train, and in not allowing her to return on the ticket to Decatur.

Legal Conclusions. It is averred in these and the remaining count, that the conductor willfully, violently and forcibly ejected plaintiff from the cars. These are expressions of mere conclusion of the pleader, intended,

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as made, we take it, in aggravation of damages. The action is not brought to recover for the rudeness and violence of the conductor. Good pleading would require the facts constituting the willfulness and force employed by the conductor to have been set out, if he used more force than was necessary to effect a peaceable and proper ejection of plaintiff.

The terms of the contract as contained in the ticket, are not set out in the counts ; but, it is averred in substance, that the plaintiff had purchased a ticket, on which she was authorized to ride, and that she was not allowed to do so, and, notwithstanding she had such a ticket, she was put off the train by the conductor. This showed a good cause of action, and, without more, entitled her to maintain the action, and on proof of the averments to recover some damages.

4. As to the right of a conductor to eject a passenger who is found riding on a train, on a ticket void on its face, it is proper to say, and we may announce, without elaboration, as the proper conclusion sustained by the great weight of authority, that the ticket is the sole and conclusive evidence to the conductor of a passenger's right, as such, to be on the train ; that the conductor has a right to rely upon the express language of the contract as expressed in the ticket, and when it is void on its face, in default of payment of fare he may deny the right of the passenger to ride on such ticket, and expel him in a proper manner from the train. Mosher v. Railroad Co., 127 U. S. 390, 8 Sup. Ct. 1324 ; *Id.*, 23 Fed. 326, 328 ; Poulin v. Railway Co., 3 C. C. A. 23, 52 Fed. 197 ; Railway Co. v. Bennett, 1 C. C. A. 544, 50 Fed. 496 ; Hall v. Railroad Co., 15 Fed. 57 ; Townsend v. Railroad Co., 56 N. Y. 295 ; Shelton v. Railway Co., 29 Ohio St. 214 ; Frederick v. Railroad Co., 37 Mich. 342 ; Bradshaw v. Railroad Co., 135 Mass. 407 ; Murdock v. Railroad Co., 137 Mass. 293 ; Railroad Co. v. Fleming, 14 Lea, 128 ; Dietrich v. Railroad Co., 71 Pa. St. 432 ; Petrie v. Railroad Co., 42 N. J. Law, 449 ; Railroad Co. v. Griffin, 68 Ill. 499 ; Pennington v.

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Railroad Co., 62 Md. 95 ; Johnson v. Railroad Co., 63 Md. 106 ; 4 Elliott, R. R. § 1594 ; Mechem's Hutch. Carr. § 580j ; Manning v. Railroad Co., 95 Ala. 392, 11 South. 8 ; Railroad Co. v. Carmichael, 90 Ala. 19, 8 South. 87 ; Railroad Co. v. Huffman, 76 Ala. 492.

5. The second amended count containing the same averments as the first and third counts, as to the purchase of the ticket, sets out the terms of the contract as expressed in the ticket, as follows : "That it is not good for return passage unless the holder identifies himself as the original purchaser, before the authorized agent of the Memphis & Charleston Railroad, at point first named above (which plaintiff avers was Huntsville), and when officially signed and dated in ink and duly stamped by said agent, this ticket shall then be good only for a continuous passage to starting point, as last named above (which plaintiff avers was Decatur, Ala.), only on next passenger train leaving after date of said identification, but in no case later than the date canceled in the margin (which plaintiff avers was October 31, 1894)." This is followed by averments in substance, that plaintiff did, on June 22, 1894, travel as a passenger on defendants' cars on said ticket from Decatur to Huntsville, Ala., and on or about June 22, 1894, presented herself for identification as the original purchaser of said ticket, to the proper and duly authorized agent of defendants in charge of the Memphis & Charleston Railroad, at Huntsville, Ala., (whose name was unknown to plaintiff), and offered proof of her identity as required by said ticket ; that she requested said agent to fix her said ticket in all respects as required by the stipulations on plaintiff's ticket as above set out ; that it was within the scope of his duties prescribed by his employment, as agent of defendants, to officially sign, date and stamp in ink the said ticket of plaintiff, but the said agent wholly refused and failed, though requested, to do so ; that after said agent at Huntsville refused to sign, date and stamp her ticket, as averred, she took passage at Huntsville, on or about June 22, 1894, on the next passenger train of defendants for

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Decatur, etc. Then follow the averments of her ejection from the train by the conductor, substantially as made in the first and third counts. Unlike these counts, as we have said, the contract as contained in the ticket is here purported to be set out, at least in part. It would have been well, if the whole contract had been set out. It appears from the face of the ticket itself, that plaintiff had no right to return thereon from Huntsville to Decatur, until the same had been signed, dated and stamped in ink by the agent at Huntsville, and the averment is made that this was not done; and yet it is averred, that plaintiff got on the car and attempted to ride on such ticket, void on its face, from Huntsville to Decatur. She knew the conditions of her ticket, and that by its terms, she was not entitled to return on it to Decatur. She was a trespasser on the train according to these averments, and as the conductor had nothing to go by but her ticket, he had the right, and it was his duty, in default of paying her fare, to put her off in a proper manner. So, if the cause of action relied on in this count, is the wrongful conduct of the conductor in expelling her, it is manifest she cannot recover under it. It is clear also that on the averments of the complaint, the plaintiff has a cause of action arising from the breach of duty of the ticket agent at Huntsville, in failing and refusing to sign, date and stamp her ticket in ink, when, as she avers, she presented it to him and requested him to do so, and offered to prove her identity. It may be that this count was intended by the pleader to set forth such cause of action, and that the act of the conductor as therein set forth, in expelling plaintiff from the cars, is not relied or counted on, as the real cause of action. We are disposed to so construe and treat the count.

Cause of Action.

6. From the foregoing presentation of the different counts of the complaint, it appears, that in the absence of averment in the first and third counts, of the terms and conditions of the ticket-contract, the case could be tried properly on those counts, on its real merits, only

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on pleadings which would present the real issue. If the facts of the case were fully set out, the general issue would, so far as appears, place the parties in proper attitude to try the case on its merits.

7. The defendants pleaded to the entire complaint, first, the general issue, and a second, special plea, setting up that plaintiff "attempted to ride on said ticket from Huntsville to Decatur, although said ticket was not signed, dated and stamped by the agent at Huntsville, so as to entitle her to ride thereon, and this, plaintiff well knew, and failed and refused to pay her fare from Huntsville to Decatur."

The plea was no answer to the first and third counts, for there is nothing in these counts, as has appeared, to show that the ticket on which plaintiff traveled, contained any stipulation requiring it to be signed, dated and stamped by the Huntsville agent, before plaintiff was entitled to ride on it. But the court overruled the demurrer which was interposed to this plea, and plaintiff took issue on it.

The facts set up in this plea were established, without conflict of evidence, which entitled the defendants to the general charge as asked. The plea, as we have said, not sufficient as to the first and third counts, presented also, as a special plea, an imperfect issue on the allegations of the second count. If the gravamen of the action is the misconduct of the Huntsville agent, the plea is no sufficient answer to the complaint. It does not respond to the real cause of action,—the alleged misconduct of the Huntsville agent,—but was evidently intended as an answer to the first and third counts, and to the second also, treating it like the other counts, as complaints for the violation of duty to the plaintiff by the conductor. It may be that the issue, on this count, could have been appropriately tried on the plea of the general issue; but not relying on that alone, the defendants interposed the special plea, pleaded to the whole complaint. When issue is joined on an insufficient or immaterial plea, as was here done, and its averments are proved, without conflict in evi-

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dence, the defendant is entitled to the general charge. Such a charge was asked and refused in this case. *Taylor v. Smith*, 104 Ala. 538, 16 South. 629; *Lewis v. Simon*, 101 Ala. 546, 14 South. 331; *Winter v. Pool*, 100 Ala. 503, 14 South. 411.

We have not gone specially into the various questions raised on assignments of error on this record, but have confined what we have said to general principles, which—as the cause must be reversed—will lead to an easy and simpler presentation of the real issues in the case, and its trial on the merits.

Reversed and remanded.

BROWN'S ADM'R

v.

LOUISVILLE & N. R. Co.

(*Court of Appeals of Kentucky, Feb. 19, 1898.*)

Ejection of Drunken Passenger—Subsequent Death on Track—Liability of Company.*—In an action to recover for the negligent killing of plaintiff's intestate, it appeared from the evidence that deceased, while helplessly drunk, entered one of defendant's passenger coaches, and, upon his refusal to pay his fare, was ejected at night at a regular depot, several passengers having alighted from the car at the same time; and that he subsequently wandered upon defendant's track, and was killed by another train. *Held*, that it was not error to peremptorily instruct for defendant.

APPEAL by plaintiff from circuit court, Laurel county. *Affirmed.*

H. C. Eversole, for appellant.

J. A. Craft and *J. W. Alcorn*, for appellee.

GUFFY. J. This action was instituted in the Laurel circuit court, by Robert Brown, administrator of James Brown, against the appellee, seeking to recover a judgment against the appellee for negligently causing the

*See notes at end of case.

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death of said decedent. It is alleged, in substance, in the petition, that the intestate, James Brown, about the 2d of April, 1895, entered a coach composing one of defendant's passenger trains, running north on its road, known as the "Night Express," at Corbin, in Whitley county, Ky., on his way to the city of Cincinnati; that, at the time said Brown entered said train, he was intoxicated by the use of spirituous, vinous, and malt liquors to such a degree that he was maudlin drunk, and totally helpless, both mentally and physically, in which condition said Brown remained until the train reached the depot of the defendant in the town of London, Laurel county, Ky, at which time and place the agents and servants of the defendant, who well knew the then drunken and helpless condition of said James Brown, unlawfully, with willful negligence, by force, ejected said James Brown, plaintiff's intestate, from and off of said car, and left him in the dark, at nighttime, about 1 o'clock at night, near the track of its railroad, said agents and servants knowing at the time that the trains operated on said railroad, both freight and passenger trains, would soon thereafter be passing said depot at London, where they left said Brown, and knowing that said Brown was incapable of taking care of and protecting himself from death and injury from passing trains. The plaintiff further states and charges that said Brown, within a short time after he was left near the track of defendant's road, and within a few hundred feet of where he was left by defendant's agents, and while he was, from said intoxicated condition, yet drunk, and unable, mentally and physically, to take care of himself, he wandered onto the track of the defendant's railroad, but a short distance from where he was left by defendant's agents and servants, and was run over by one of defendant's engines and trains running south on said road, and cut into pieces, and mangled, so that he then and there died, all of which was the result of the willful negligence of the agents and servants of the defendant in ejecting said James Brown from the train of the

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defendant, to the damage of the estate of said James Brown, and to plaintiff, as the administrator of said James Brown, in the sum of \$10,000. The answer of defendant reads as follows: "The defendant says it is true, as alleged in the petition, that James Brown entered one of its trains at Corbin, about the 2d day of April, 1895. It says it does not know what the condition of said Brown was. It denies that, at the time said James Brown entered the train at Corbin, he was intoxicated by the use of spirituous, vinous, or malt liquors to such an extent that he was maudlin drunk. It denies that he was totally helpless, either mentally or physically; denies that said Brown remained in such drunken or helpless condition until he reached the depot at London, Ky. It denies that the agents or servants of this defendant, well knowing or knowing at all the then drunken and helpless condition of said James Brown, unlawfully or with willful negligence, by force or at all, ejected plaintiff's intestate from one of its cars. It denies that it left him in the dark at nighttime; denies that it left him near the track of its railroad. It denies that it or its agents or servants ejected said intestate from its car; denies that it used any force whatever. It denies that its agents or servants well knew or knew at all that the trains of defendant, both freight and passenger, or either, would soon be passing said depot at London. It denies that its agents or servants left said Brown knowing him to be incapable of taking care of or protecting himself from death or injury from passing trains. It denies that said Brown was in such drunken or helpless condition at all. It denies that, within a short time after James Brown was left near the track of defendant's road, or within a few hundred feet of the place where he was left by defendant's agents or servants, or while he was, from said intoxicated condition, yet drunk, or while mentally or physically unable to take care of himself, he wandered on defendant's track, a short distance from where he was left by defendant's agents or servants, and was run over by one of defendant's engines and trains; denies

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that by any wrongful act or acts of this defendant, or its agents or servants, the intestate was run over and cut into pieces or mangled, so that he then and there died; denies that said killing was the result of the willful negligence of the agents or servants of this defendant in ejecting James Brown from the train of defendant. It denies that it has been guilty of any willful or other negligence whatever. It denies that the estate of James Brown or the plaintiff, as administrator, has been damaged in the sum of \$10,000, or any sum, by any wrong of defendants, or at all." Plaintiff's amended petition reads as follows: "The plaintiff, Robert Brown, administrator of the estate of James Brown, deceased, for amendment to his original petition, states that the agents and servants of the defendant who ejected plaintiff's intestate from its trains, as alleged in plaintiff's original petition, were the agents and servants of the defendant in charge of the train from which said James Brown was ejected, and that said agents and servants knew the danger to which the deceased, Brown, would be subjected to the trains of the defendant, which they knew would be passing the depot at London, Ky., on the track of defendant's railroad the place where they, the agents and servants of the defendant in charge of said train, willfully and negligently ejected said Brown from said train, as alleged in plaintiff's original petition." Defendant's amended answer and answer to amended petition reads as follows: "The defendant, for answer to the amended petition, and for amendment to its original answer, says that it denies that its agents or servants in charge of its train knew that James Brown, the intestate, would be subjected to any danger from its trains passing the depot at London, when he left defendant's train at that point, or when they left said Brown at that depot. Defendant denies that its said agents or servants wilfully or negligently ejected said Brown from the train. Defendant denies that it has knowledge or information sufficient to form a belief that when said Brown entered its train, at Corbin, he

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was on his way to Cincinnati, Ohio. Defendant denies that when said Brown entered its train, at Corbin, he was intoxicated to such a degree that he was maudlin drunk, or that he was totally helpless, or helpless at all, either physically or mentally. Defendant denies that he was totally helpless, or helpless at all, either physically or mentally, when its train reached its depot at London, and denies that they or any of them ejected him at London from its train. Defendant denies that said Brown was incapable of taking care of or protecting himself when he was left at London from its trains, and denies that he was either mentally or physically incapable of taking care of himself when he got onto defendant's railroad track, after the train on which he had been carried passed that station. (2) Defendant says that it admits that plaintiff's intestate did enter its train at Corbin, as a passenger, but says that, when demanded of him by the conductor in charge of its train, he failed and refused to either exhibit a ticket for his fare or to pay his fare, and for that reason said conductor informed him, before the arrival of the train at London, that he must get off the train when that station was reached, or else show a ticket or pay his fare; and, when the train did stop at London, he failed to show a ticket or to pay his fare, but voluntarily, and in company with other passengers, prudent citizens of the town of London, left the train at that station, and did not thereafter return to it; and defendant says that these, and none other, are the alleged wrongs and injuries complained of in the petition and amended petition." The affirmative matters in the answer were controverted of record. A jury trial resulted in a verdict for the defendant upon a peremptory instruction by the court. The appellant's grounds for a new trial are as follows: (1) Because the court failed and refused to properly instruct the jury as to the law of the case; (2) because the court erred in instructing the jury to find for the defendant in this case; (3) because the court erred in refusing to give the instructions asked for by plaintiff, Nos. 1 and 2;

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(4) because the testimony did not authorize the court to instruct the jury to find for the defendant. Appellant's motion for a new trial having been overruled, he prosecutes this appeal.

The plaintiff's testimony is as follows :

The plaintiff introduced C. M. Randall, who, being sworn, testified as follows : "About the last of March, 1895, or the first days of April, 1895, I got on the train of the Louisville & Nashville Railroad Company, at Lilly, in Laurel county. It was the night express, running north. Mr. G. W. Delph was the conductor. There was a man laying on a seat in the smoking coach when I entered the train. He seemed to be in a stupor or asleep. The conductor and others came to him, and shook him, and tried to arouse him. He roused up some, and said he had a ticket. The conductor looked in his pockets and his valise, and found no ticket. The conductor pulled, raised, him up. He didn't pay any fare or show any ticket, and said he would not pay any fare. I did not understand what he said. He muttered and cursed something. He said nothing until he was aroused. The conductor opened his valise, and there was some clothes and a block of candle coal in the valise. I told the conductor he might hit him with the coal. He showed no ticket, nor paid any fare. The conductor told the man he would have to pay his fare, or he would put him off at London. This was after he had passed Faris Station, and near London the man was still in a stupor or drowsy. They had shook him, and some of the men on the train, in the presence of the conductor, poured water on him. He had aroused some when we arrived at London. I, at the request of the conductor, carried his valise off the train. The conductor was Delph. Some one else led the man off the train. I set his valise down six or eight feet from the railroad track. The man walked to it, and, when I saw him last, he was stooped down over it. It had fallen open. I left him, and have never seen him since, and don't know who he was. C. N. Scoville and H. C. Thompson were in company

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with me when I boarded the train at Lilly, and when I got off at London. When I got off at London, I saw the porters of the Catching Hotel and the Riley House there, standing near the train where we got off. Don't remember of seeing any one else at the depot. The man was working with his valise the last I saw of him, in six or eight feet of the track of the railroad. This was about one o'clock in the morning. To leave the place where I last saw the man, to come to Main street, and come up town, he would have had to come an east course, thirty or forty yards of which distance was over a plank walk between two lots and a fence on either side, or have gone around the depot a north-east course, about two hundred feet, to get to Main street, or go west over the railroad track, and either go by the street crossing, or cross a culvert about twenty feet wide to get to the west side of the railroad, or go north on the railroad track, or south on the same. To go either north or south, there was an embankment or ditch or fence on either side of the same, except the ways I have stated going north on the railroad track; there was an embankment on either side of the railroad. To go south there was a ditch on the right of the railroad, and a fence on the left for several hundred feet. The man said nothing nor done anything until they aroused him; was not nor did not interfere or bother the passengers. There was C. N. Scoville, myself, and H. C. Thompson got off the train, and the man they put off. I saw Catching Hotel porter and Jarve Sutton, the Riley House porter, there. That was all the people I remember to have seen. I think the depot was open, and lights burning in the office and waiting room. After I got off the train, I set the man's valise down seven or eight feet from the track, and then started off to town. The last I saw of him, he was stooping down over his valise, and two or three persons were standing near him. The conductor, in leading him off the car, simply took hold of him, and helped him along, and helped him get down off the car platform and car steps."

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The plaintiff then introduced C. N. Scoville, who testified as follows: That he was on the northbound train of the defendant from Lilly, Ky., to London, Ky., on the night of the last days of March or first days of April, 1895. "C. M. Randall and H. C. Thompson were in company with me. We boarded the train at Lilly, and got off at London, Ky. There was a man lying on a seat in the smoking car when we entered. He was asleep, or seemed to be. Mr. Delph was the conductor. He came along, and took hold of the man, and shook him. He seemed to be in a stupor. The conductor finally pulled him up, and looked in his pockets for ticket. He found no ticket on him. He found some money. I saw a bill and some silver money. I don't know how much. The man was bothering no one when we went in, and did not. When the conductor pulled him up, he muttered and cursed some. The conductor opened his valise. There was some clothing, shirts, socks, etc., and a block of candle coal in the valise. The man muttered. I could not understand much he said. He said he was going to Cincinnati, Ohio. The conductor, Mr. Delph, told him, if he did not produce a ticket or pay fare, he would put him off at London. To this he made no response that I heard. This was just before we reached London. When we got off, the conductor and some one else led the man off the train at the depot in London. C. M. Randall carried his valise. It was a black valise, eighteen inches or two feet long. I left the depot for home. The man was standing six or eight feet from the railroad track at his valise. He halloed a time or two just before I left. Before reaching London, the conductor and others poured water on him, in his face, and under his clothes. They had aroused him a little by the time we reached London. The man was quiet all the time, unless when they were working with him. Then he muttered, and about all I understood was that he was going to Cincinnati, and that he had a ticket; but the conductor and the other parties could not find any ticket after searching everything. I did not know

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him. Never saw him any more. It was about 1 a. m. when we got off the train. The regular time for the express train to pass south at London at night was between 2 and 3 a. m. each day at that time. The conductor and others pulled him up in his seat. The man seemed to be in a stupor, or drunk. He could not speak so he could be understood, except I understood him to say he was going to Cincinnati, and that he had a ticket. After the conductor had roused him up, he said he had a ticket. The conductor examined his pockets and valise, but found no ticket. The porters from the hotels in London were in the habit of meeting that train at the depot, and I saw them there when we got off that night. There may have been others there, but I do not remember about that. Mr. Randall, Mr. Thompson, and I were all well acquainted with the conductor. We had tickets for London, which he took up."

The plaintiff then introduced H. C. Thompson, who testified that on the night of the last days of March or the first days of April, 1895, he, with C. M. Randall and C. N. Scoville, entered the train of the defendant at Lilly, Ky., at night. It was the northbound express. "When we entered, we went into the smoking car, and there was a man I did not know lying on a seat, asleep, or seemed to be. The conductor came along, and he and some of his men took hold of the man, shook him, and looked in his pockets for his ticket, but found none, and looked in his valise. They found some money on him. It was the conductor, Mr. Delph, who searched him for ticket and looked in his valise. He had ten dollars in paper money and some coins in his pockets. I don't know how much. The conductor told the man he would put him off if he did not show his ticket or pay his fare. The man was drunk or in a stupor for some cause. He was bothering no one, nor said anything until the conductor and others commenced working with him. He then muttered and probably swore. He was very drunk or in a stupor for some cause; appeared to be drunk. I

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understood him to say he was going to Cincinnati, Ohio, and that he claimed to have a ticket. The conductor or some, by his directions, poured water on him. When we arrived at London, the conductor and some of his men took hold of the man, and led him off the train. C. M. Randall carried his valise at the request of the conductor. I went off on the west side of the train, and they led the man off on the east side of the train. I did not see the man any more until next morning, at the depot, I saw his corpse. He had been cut up from some cause, and badly mangled, and was dead. It was the same man that I saw taken off the train that I saw dead next morning at the depot. I heard his name was James Brown next morning after he was found dead. It was about 1 a. m. in the morning when he was put off the train at London. The man did not want to leave the train, and seemed to be trying to resist being put off; did not agree to go off."

The plaintiff then introduced Jarvis Sutton, who testified that on the morning of the 2d of April, 1895, at 1 a. m., or about that time, the north-bound express train on the Louisville & Nashville Railroad arrived at London, Ky. "I was then a porter for the Riley House, an hotel in London, which is one or two hundred yards from the depot. C. M. Randall and C. N. Scoville and another man got off the train. I did not see H. C. Thompson. The man I did not know was drunk. C. M. Randall carried his valise off, and set it down. Some one led the drunk man off. I did not know the man that was led off the train. He went to his valise, and some one of the trainmen said: 'Take him to an hotel. He had money to pay his fare.' I spoke to him, and asked him if he wished to go to an hotel. He said, 'No;' said he wanted to go to Pittsburg. I told him he would have to go north on the railroad track to go down to Pittsburg. He picked up his valise, and started south. I told him that was the wrong direction, and he said he knew where he was going, and went off in the dark on the railroad, south from the railroad depot. I saw the

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same man dead, on the railroad track south of the depot, next morning. He had been cut on the legs and body, and was dead; his legs broke, and his body nearly cut into pieces. The man was drunk when put off the train, but could walk. I was porter for the Riley House, and was in the habit of going to the depot to meet that train, to solicit customers for our house. The porter of the Catching Hotel was there also. We had lanterns. The man stood where Mr. Randall had left his valise until the train had gone. He then walked up to the baggage truck, set his valise down, and pulled off his coat. As the train was pulling out, one of the men on the train called to us, and told us to take the man to an hotel; that he had money to pay his bill."

The plaintiff then introduced Fred Hagy, who stated that on the morning of April 2, 1895, he found a man dead on the track of the Louisville & Nashville Railroad Company, 350 or 400 feet south of the depot at London, Ky. "I did not know him. He was a heavy-looking man. From what I could see, his body was nearly severed across; his bust, his legs, and thighs broke. His head and a portion of his body was on the outside of the railing; the other portion of his body between the railing of the road track. I found the man about daylight. I learned that his name was Brown. I did not know him. His corpse was given over to some of his relations, and taken to Pittsburg, in Laurel county, three miles north of London, Ky. The track of the Louisville & Nashville Railroad from the depot to where the man was killed is above the level of the ground; a ditch on the right side, and embankment. On the left is a fence and ditch. To leave the depot, and go north, there is an embankment on each side of the road for several hundred feet. In order to get up to Main street, there is a yard; but, before you get to Main street, you come to the lot of Mr. Vogliotties, about 200 feet along Main street. In order to reach Main street, there is a four-foot walk between his lot and Mrs. Jackson's lot; or you can go north, and around the lot, and reach Main street—a distance of 200

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feet. The corpse was sent to Pittsburg in care of some of his friends."

The plaintiff then introduced W. L. Brown: "I am judge of the Laurel county court. On the morning of April 2, 1895, I learned there was a dead man on the track of the Louisville & Nashville Railroad. I went over there, and just 300 or 400 feet south of the depot I found a man dead, and had an inquest. I learned from letters on him, and from his relations, that his name was James Brown. I gave his corpse over to his relations, Renos Brown, at Pittsburg, Ky., in this county. He is no relation to me. His body was nearly severed across his bust, his thighs broke, and otherwise badly mangled. He was lying across the railing of the railroad track, partly on the outside, and part of his body on the inside, of the track. He had been struck about fifty feet north of the place where I found his body, blood, hair, and bones scattered along. His valise was also north of him some feet. Had some shirts, socks, and a block of candle coal in it, and also a broken bottle, with a little red liquor in it. From the signs, the train had been running south, as the blood, etc., was on the rails for forty or fifty feet north, and towards the depot, from where I found the body. I did not know him when I found him. London is a town of a thousand or more inhabitants, with three or four hotels, one or two hundred yards from depot; a quiet town. It is the custom of the conductor on this line of road to take ticket as soon as they pass station, and, if passenger has no ticket, they are ejected at next station."

Plaintiff then introduced Wm. Stringer, who testified that he was acquainted with James Brown. Saw his corpse at his own house in Pittsburg, brought there by Renos Brown. He knew the corpse was that of James Brown; that he was accustomed to traveling on the Louisville & Nashville Railroad; that it is the custom of the conductors on said road to take up tickets for passengers on railroad as soon as they leave station where the passenger enters, and before they reach the

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next station, and if passengers enter without ticket, and fail to pay their fare, they are put off at next station.

The plaintiff then introduced James Brown, who testified: "I am an uncle of the deceased, James Brown. He left me at Log Mountain, in Bell county, on the evening of the 1st of April, 1895, going to the state of Ohio. He left Log Mountain on a branch road, and got to Pineville that evening; and the train leaves there at night, and connects with the Jelico train at Corbin. He was a low, heavy-set man, a miner by occupation, and 26 years of age. I saw his corpse, and know the man that was killed at London was James Brown."

The plaintiff introduced William Brown, who made the statements that James Brown made, except he said he was a brother of the deceased.

We need not consider the testimony introduced by defendant. The only question for decision is whether there was any proof introduced to authorize the verdict in favor of plaintiff. It will be seen from the testimony that the intestate was so drunk that he was incapable of comprehending the situation, and of recognizing his obligation to the company, and, in fact, incapable of producing a ticket, if he had one, or of understanding the importance of paying his fare, or, indeed, to give any intelligible account as to his desires or intentions. It may also be conceded that, owing to the peculiar location of the depot and grounds at London, a person in his condition would be unable to determine as to the safety of any route which he might desire to take, if, indeed, he was capable of having a desire at all. It must, however, be conceded that the appellee was not bound to carry a passenger who had no ticket, and who also failed or refused to pay his fare; and it is manifest that intestate did not produce a ticket, nor does it appear in evidence that he in fact had a ticket, and, while it appears that he had in his possession a sufficient amount of money to pay his fare, yet he did not tender the same. It was therefore lawful to eject him from the train, provided he was not left at a time and

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place where serious injury would be the probable result. The case of *Railroad Co. v. Sullivan*, 81 Ky. 625, is unlike the case at bar. It appears from the evidence in that case that Sullivan was, upon the failure to pay his fare when drunk, put off the train on a very cold evening, when the snow was eight or ten inches deep, and at a point some distance from any station. The facts and circumstances in that case rendered it highly probable, if not almost certain, that death or great personal injury would necessarily accrue to him. The case of *Railroad Co. v. Ellis' Adm'r*, 97 Ky. 332, 30 S. W. 979, is cited by appellant. In that case it appears that a passenger was ejected from a train, and left at a distance from any depot, and in a cut or at a dangerous point on the road, and also that a passenger had offered to pay his fare.

It will be seen from the evidence in the case at bar that the intestate was put off the train at the town of London, at a regular depot, and that three other passengers, who seemed to be citizens of that place or vicinity, got off at the same time or about the same time, and that two hotel porters were also at the depot. It is therefore manifest that the facts and circumstances did not tend to show that the intestate was in any danger of death or bodily injury as the result of being then and there ejected from the train. The reasonable presumption was that there would be no danger of his suffering from cold; nor could the appellee reasonably suppose that the intestate would go upon the railroad track, where it appears he did in fact go, and receive the injury. The reasonable inference and supposition would be that he would go to some hotel, or be taken care of by some of the citizens, if in fact the appellee knew that he was too drunk to take care of himself. Inasmuch as the evidence failed to show a right, under the law, to recover, the plaintiff was not prejudiced by the court's refusing to give the instructions offered, nor by its giving the peremptory instruction; nor was he prejudiced by the introduction of testimony in behalf of the appellee before the peremptory instruction was given. Judgment affirmed.

NOTES.

Drunken Passengers—Injury Subsequent to Ejection—Proximate Cause.—Where a passenger who, while drunk, but not in such condition as to be powerless of guarding himself from danger, is ejected from a train the ejection is not the proximate cause of injuries which he subsequently receives from another train. *Louisville, etc., R. Co. v. Johnson*, 108 Ala. 62; *Railway Co. v. Valleley*, 32 Ohio St. 345, 30 Am. Rep. 601.

In an action against a railway company for the death of a drunken man run over after being ejected from a train, a charge to find for the plaintiff if the death "was caused by or was the natural and probable consequence of his being ejected by the conductor in such a condition," was held to be erroneous in not limiting the liability to the "natural and probable consequences" of the ejection. *St. Louis, etc., R. Co. v. Williams*, (Tex. Civ. App.), 37 S. W. Rep. 992.

Same—Same—Liability of Company.—If a passenger is unable to take in his position, surrounding perils, and his duty to avoid them, or if he does not possess the power of locomotion, and he is put off the train by the conductor because of his misconduct, and in a place known by the conductor to be dangerous to one in his condition, the company is liable for damages resulting from such action. *Johnson v. Louisville, etc., R. Co.*, 104 Ala. 241; *Louisville, etc., R. Co. v. Johnson*, 108 Ala. 62; *Johnson v. Chicago, etc., R. Co.*, 58 Iowa 348; *Louisville, etc. R. Co. v. Sullivan*, 81 Ky. 629, 50 Am. Rep. 186.

A drunken passenger upon a train was, owing solely to his condition, carried past his destination, and then, failing to comprehend his liability to pay further fare, or to get off the train, he was removed lawfully from the train and placed a short distance from the track. Subsequently he wandered upon the track, where he was run over and killed by another train at a point where those in charge of the latter train did not and could not see him in time to prevent the accident. *Held*, that the company was not liable for his death, and was not chargeable with notice of his condition or whereabouts. *McClelland v. Louisville, N. A. & C. R. Co.*, 18 Am. & Eng. R. Cas. 260, 94 Ind. 276.

If train officials who are aware that a passenger is so intoxicated as to be unable to care for himself, eject him from a train at a place and under such circumstances as to expose him to danger from passing trains, the company will be liable, if while in such helpless condition and shortly after his expulsion, he is killed by another train on the same road. *Louisville & Nashville R. Co. v. Ellis' Adm'r* (Ky.), 2 Am. & Eng. R. Cas., N. S., 132.

Where a drunken passenger, unable to take care of himself, was put off in a cut between stations, where he was drowned in a pool of water, it was held that the company might be liable, notwithstanding that the immediate cause of the death was the drowning, and not the fact of his intoxication. *Gill v. Rochester, etc., R. Co.*, 37 Hun (N. Y.), 107.

If a passenger on a train is intoxicated to a degree to render him unconscious of danger, and the place where he is put off and left is dangerous to one in his condition, and these facts are known to the conductor, the latter will be guilty of recklessness and wanton negligence, rendering the company liable for damages resulting from such negligence. *Louisville, etc., R. Co. v. Johnson*, 108 Ala. 62.

The right of a railroad company to put off an intoxicated, bois-

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terous, or disorderly person from its train is not doubted. But it is also well settled that such ejection must be done in a reasonable manner, at a proper time and place, and, considering his condition, without exposing him to harm or imperiling his life. A conductor upon the defendant's train removed therefrom the plaintiff's intestate, who had failed to produce a ticket when required, and who had no money wherewith to pay his fare. There was evidence tending to show that the intestate had bought and lost his ticket, and before he was expelled one of his companions tendered the fare to the conductor, who refused to receive it, demanding a ticket. The intestate, who was very much intoxicated, was put off the train in a cut twenty feet deep. He proceeded in the direction of his home some one thousand seven hundred feet, when he lay or fell down, and was run over and killed, about fifteen minutes later, by the train of another company which had the right to run its cars over the defendant's road. It was held that, as the intestate was wrongfully removed from the train, the question as to whether his death was or was not directly traceable to such removal should have been left to the jury, and that the court erred in nonsuiting the plaintiff. *Guy v. New York, etc., R. Co.*, 30 Hun (N. Y.), 399.

HAMILTON

v.

PITTSBURG & L. E. R. Co.

(Supreme Court of Pennsylvania, Jan. 3, 1898.)

Ejection of Drunken Passenger—Subsequent Death—Negligence—Proximate Cause.*—A railroad passenger, being slightly intoxicated, failed to get off at his station, but was assisted by the conductor to alight after the train had passed a short distance beyond it. He reached his station in safety; but his body was found on the next day lying upon the bridge of another railroad company. *Held*, that the conductor's act in assisting him to alight was not the proximate cause of his death.

APPEAL by plaintiff from court of common pleas, Lawrence county. *Affirmed*.

B. A. Winternitz and *Jno. G. McConahy*, for appellant.

D. B. & L. T. Kurtz, for appellee.

*See *Brown's Adm'r v. Louisville & N. R. Co.* (Ky.), *ante* and *notes*.

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FELL, J. In this case a verdict was directed for the defendant, on the ground that the evidence would not justify a finding of negligence which was the proximate cause of the death of the plaintiff's husband. The facts shown by the testimony are these: The plaintiff's husband got on a car of the defendant company at Lowellville, to ride 10 miles, to New Castle Junction, where he was to change cars, and take a train on a branch road operated by the defendant, for New Castle, where he lived. He was under the influence of liquor, and was assisted on the train by a friend, who requested the conductor to see that he got off at New Castle Junction, and took the train for New Castle. He failed to get off the train at the junction, and was not notified by the conductor, who, noticing him in the car soon after the train left the station, assisted him to alight, and pointed out to him the station which had been passed. This was between 8 and 9 o'clock at night, in September. The body of the deceased was found between 4 and 5 o'clock the next morning on a railroad bridge owned by another company, some 1,100 feet on the other side of the station. He had apparently been dead about an hour, and the injuries to his body were of such a character that his death must have followed very soon after they were received. He was not, while on the train, in a helpless condition of intoxication. With slight assistance, he got on and off the car. He paid his fare to the conductor, and, when the brakeman pointed out to him the station to which he would have to walk back, he said. "Good night. Don't bother about me; I'm all right,"—and walked without difficulty towards the station. The friend who brought him to the cars at Lowellville had procured for him a flask of whisky, which was handed to him after he was seated in the car, and a broken whisky flask was found near his body the next morning. There was considerable conflict in the testimony as to the distance from the station to the place where he got off the car, some witnesses stating it as not more than 200 feet, and others as 2,000 feet. The

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place was a dangerous one for a man in the full possession of his faculties. It was at a point which was poorly lighted, and where there were a number of parallel tracks on which trains frequently passed. These are the important facts as they appeared at the trial.

The plaintiff could not make out a case against the company by proof alone of negligence on the part of the conductor in directing her husband to get off the car at a place of danger. No matter what the danger of the place, or how clear the negligence, he was not injured there; nor until after he had reached a place of safety, and passed beyond it; nor until after such a length of time that, if still intoxicated, it must have been the result of further drinking. He reached the station in safety, passed by it, and to the tracks of another company, and along them 1,100 feet; and, as far as the testimony throws any light upon the subject, he was not killed until at least six hours after he left the train. What had occurred in the meantime no witness knew. If he became sober, and ventured on the bridge, or if he drank again, and became intoxicated, and wandered aimlessly about, the defendant company was in no way responsible for his death. If he had got off the car at the station in his then semi-intoxicated condition, the company would have been under no duty to guard him from danger. The negligence with which it was charged was in putting him off the train at a place of danger. But this danger he entirely escaped, and, when he reached the station, he was as safe as if he had got off there. No negligent action of the company was the proximate cause of his death. Judgment affirmed.

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LOUISVILLE & N. R. Co.

v.

HALE *et al.*

(*Court of Appeals of Kentucky, Jan. 18, 1898.*)

Carriers of Passengers—Injury to Passenger by Starting of Train.*—Plaintiff, a large fleshy woman of about 35 years of age, with an escort, but incumbered with several young children, entered defendant's car; and in an action against the company alleged that she was injured by the violent starting of the car before she had time to take a seat. *Held*, that the conductor was not chargeable with notice that extraordinary care was required in starting the train after plaintiff had entered the car, she not having requested his assistance in getting seated.

APPEAL by defendant from Laurel county circuit court. *Reversed.*

J. A. Craft and J. W. Alcorn, for appellant.

Tinsley & Faulkner and Ewell & Smith, for appellees.

DU RELLE, J. The appellee recovered judgment for \$1,500 against the appellant for injuries alleged to have been caused by the violent forward movement of appellant's train at Lily,—at which place appellee boarded the train of appellant,—which threw her against the arm of a car seat before she could get seated. She alleged that she sustained injuries in the back, hip, and knee, which confined her to her bed for some three months, and which were painful and permanent in their nature, since which time she has been unable to perform much labor.

The principal error relied on for reversal is in the giving of instruction 1 offered on behalf of appellee, which is as follows: "If the jury shall believe from the evidence that plaintiff purchased a ticket of defend-

*See note at end of case.

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ant from Lily to Richmond, Ky., and attempted to get aboard of defendant's train at Lily, and that those in charge of said train caused same to start before she had reasonable time to safely get aboard and get seated, and that in so starting or moving said train she was thrown upon and between the seats, and injured in her knee, hip, or back, they will find for her such sum in damages as they may believe will reasonably compensate her for such injury, not exceeding \$10,000." The question presented for decision is whether, under the circumstances of this case, the appellant was required to hold its train until appellee had time to get seated. This question, we believe, has never been passed on in this state. It appears that appellee was a large, fleshy woman, about 35 years of age; that she went to the train in company with her son-in-law, who intended to see her off, with two boxes of household goods, six children, ranging in age from 18 months to 12 years, and a basket. It is alleged in the petition that the customary warning, "All aboard!" was given by the conductor. Appellee states that the train gave a violent jerk while she was upon the platform. This, however, did not cause the injury complained of. It appears from her statement that some of the trainmen assisted some of the children to get upon the train; that her eldest daughter took one child, her son-in-law another, and she carried the baby upon one arm, and the basket upon the other. The train officials state that, after she had gotten into the car, they went forward to the baggage car, and saw to putting the two packing boxes on board the car before the signal was given, or the start made. Undoubtedly, her injury was not caused by any jolt or jar which the train received while she was on the platform, and the question need not be considered whether such jolt actually occurred or not. The sole question is whether the conductor was required to wait after the passenger was safely inside the car until she had a reasonable time to get seated, before putting his train in motion. Undoubtedly, it would be negligence for the conductor to

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start a train while the passenger was obviously in the act of getting on the train ; but it has never been held, so far as we are able to find, that in ordinary cases the conductor is required to either see that the passenger has reached a seat, or to delay starting his train after the passenger is safely within the car. And, while there are a number of cases in which the carrier has been held liable for injuries resulting from improper stopping and starting of trains, “* * * risks of injury from jolts and jerks ordinarily incident to the movement of trains are risks which the passenger assumes.” 4 Elliott, R. R. § 1589. And see Choate *v.* Railway Co. (Tex. Sup.) 36 S. W. 247. As matter of course, the obligation of the carrier is dependent largely upon the circumstances of the particular case ; but it seems to us that, although incumbered with six children and a basket, as the appellee had the assistance of her son-in-law in mounting the steps of the train, and in managing the children, and one child was of sufficient age and size to render assistance in addition to that afforded by the trainmen, and as there is no pretense that appellee asked assistance from any officer of the train, there is nothing in this particular case to take it out of the general rule that a train may be started without waiting for the passenger to reach a seat after entering the vehicle, unless there is some special reason to the contrary, as in the case of a weak or lame person. Yarnell *v.* Railroad Co. (Mo. Sup.) 21 S. W. 1. In that case the court quoted with approval from 2 Shear. & R. Neg. (4th Ed.) § 508 : “As soon as the passenger has fairly entered the vehicle, the carrier may start without waiting for him to reach a seat, unless there is some special reason for doing so, as in the case of a weak or lame person, or of a passenger on the outside of the coach ; and the ground of the exception must be brought to the carrier’s notice, or he will be justified in starting in the usual manner.” While recognizing the duty of a railroad company to stop its train a reasonable length of time to enable passengers to get on and off, and that it is responsible for injuries caused by

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unnecessary, unusual, and negligent jerking of the train, and that it owes a higher degree of care to a lame or infirm person than to persons in ordinary health, we cannot concede that the mere fact of appellee being fleshy, and incumbered with a number of children (she having an escort with her), was any sufficient notice to the conductor of an infirmity which required extraordinary care on his part. "Negligence cannot be assumed from the mere fact of an accident and an injury." 1 Shear. & R. Neg. § 59. And see *Wintuska's Adm'r v. Railroad Co.* (Ky.) 20 S. W. 819. We are of opinion, therefore, that, under the circumstances of this case, the court erred in instructing the jury that, unless appellee had reasonable time to safely get aboard, and get seated, she was entitled to recover. It would be proper to instruct the jury, under the facts as they appear in this record, that she was entitled to a reasonable time in which to get safely in the car; and also, if the evidence justified it, an instruction upon the subject of negligent and unusual jerking in starting the train. For the reasons given, the judgment is reversed, with instructions for further proceedings consistent with this opinion.

GUFFY, J., dissenting.

NOTE.

Carriers of Passengers—Starting of Train.—A carrier need not wait for a passenger to reach his seat before starting the train, unless there is some special reason therefor, as in the case of a weak or lame person, and then the carrier must have notice of the fact creating the exception. *Yarnell v. Kansas City, etc., R. Co.*, 113 Mo. 570.

Pullman Palace-Car Co. *v.* Harvey

PULLMAN'S PALACE-CAR CO.

v.

HARVEY.

(*Supreme Court of Georgia, July 10, 1897.*)

Loss of Jewelry—Negligence of Employees—Liability of Sleeping-Car Companies.*—The declaration stated a cause of action. The charge of the court was substantially in accord with the principles announced in the case of *Kates v. Car Co.*, 23 S. E. 186, 95 Ga. 810; and, according to the ruling in that case, there was no error in refusing to charge as requested. No error was committed in excluding evidence. The verdict is supported by the evidence; and, the finding of the jury having been approved by the trial judge, his discretion in overruling the motion for a new trial will not be disturbed.

(Syllabus by the Court.)

ERROR by defendant from city court of Savannah.
Affirmed.

Erwin, Du Bignon & Chisholm and *W. L. Clay*,
for plaintiff in error.

W. R. Leaken, Jas. M. Dreyer and *Wm. P. Hardee*,
for defendant in error.

SIMMONS, C. J. In the argument of this case a request was made for the court to review and reverse a portion of what was ruled in the case of *Kates v. Car Co.*, 95 Ga. 810, 23 S. E. 186. After a very careful consideration of that case, we adhere thereto, and decline to overrule it. The principles laid down in that case govern and control the one now under consideration, and it is unnecessary to repeat what was said there, or to further elaborate the argument of MR. JUSTICE LUMPKIN. The court in the charge to the jury followed, substantially, the rules laid down in the case above mentioned, and, inasmuch as the charges

*See note at end of case.

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requested were contrary to these rulings, there was no error in refusing to give them. The evidence sought to be introduced, which was excluded by the court, was clearly inadmissible. The evidence as to the loss of the diamond pin and as to the diligence of the employees of the company was conflicting. The jury believed the plaintiff, the trial judge was satisfied with the verdict, and this court will not undertake to control his discretion in refusing a new trial. The law as to the liability of sleeping-car companies is not well settled. Courts in different states have laid down different rules as to their liability. Judges in the federal courts likewise differ. Would it not be well for the congress of the United States, if it has the power, or for the states, to legislate upon this subject, and to define the exact liability of these companies? Why not apply to them the law of innkeepers? It would protect the property of the passengers, and would certainly protect these companies from a great many suits, upon alleged fraudulent claims, which are sometimes brought against them. It seems to me that, with a very little expense in procuring a small iron safe for each car, the company could protect itself against these constantly recurring claims of the loss of diamonds and purses. This is thrown out merely as a suggestion, but with the hope that congress or the state legislatures will act upon the matter, and define the liability of the sleeping-car companies. Judgment affirmed. All the justices concurring.

NOTES.

Sleeping-Car Companies—Liability for Loss of Property.—Sleeping-car companies must exercise reasonable care and vigilance over the persons and property of passengers, especially while they are sleeping. *Carpenter v. New York, etc., R. Co.*, 47 Am. & Eng. R. Cas. 421, 124 N. Y. 53, 21 Am. St. Rep. 644; *Lewis v. New York Sleeping Car Co.*, 28 Am. & Eng. R. Cas. 148, 143 Mass. 267, 58 Am. Rep. 135; *Woodruff Sleeping, etc., Coach Co. v. Diehl*, 9 Am. & Eng. R. Cas. 294, 84 Ind. 474, 43 Am. Rep. 102; *Pullman Palace Car Co. v. Gardner*, 16 Am. & Eng. R. Cas. 324, 3 Penny. (Pa.), 78; *Pullman Palace Car Co. v. Pollock*, 34 Am. & Eng. R. Cas. 217, 69 Tex. 120,

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5 Am. St. Rep. 31; Pullman Palace Car Co. *v.* Gaylord, 23 Am. Law Reg., N. S., 788; Scaling *v.* Pullman Palace Car Co., 24 Mo. App. 29; Bevis *v.* Baltimore, etc., R. Co., 26 Mo. App. 19; Hampton *v.* Pullman Palace Car Co., 42 Mo. App. 134; Pullman Palace Car Co. *v.* Matthews, 74 Tex. 654, 15 Am. St. Rep. 873; Barratt *v.* Pullman Palace Car Co., 51 Fed. Rep. 796.

Relatively to a passenger occupying a berth in a sleeping car for which he has paid the customary fare, a sleeping-car company is under the duty of maintaining such watch and guard while the passenger is sleeping as may be reasonably necessary to secure the safety of such money, jewels, and baggage as he may properly carry on his person or have in his possession while travelling in the car; and if, while he is asleep, such property is taken from his possession, the burden is upon the company of showing that the loss did not occur by reason of a failure on the part of its employees to discharge this duty. Kates *v.* Pullman Palace Car Co. (Ga.), 23 S. E. Rep. 186, 2 Am. & Eng. R. Cas., N. S., 479, *abstr.* A sleeping-car company is liable for moneys stolen by its employees and such articles as a passenger may choose to carry for convenience and adornment. Pullman Palace Car Co. *v.* Martin (Ga.), 2 Am. & Eng. R. Cas., N. S., 475.

Proper diligence on the part of a sleeping-car company towards one of its patrons involves the exercise of ordinary care in looking out for and taking care of such property as may by him be casually left in a car of the company upon his leaving it, and the restitution of the property to the owner, when ascertained; and where such property is actually found by servants of the company, or is left or dropped in such place and under such circumstances as that, by the exercise of ordinary care, it ought to have been found by them, the company will be liable for its value. Kates *v.* Pullman Palace Car Co. (Ga.), 23 S. E. Rep. 186, 2 Am. & Eng. R. Cas., N. S., 480, *abstr.*

In Blum *v.* Southern Pullman Palace Car Co., 1 Flip. (U. S.), 500, it appeared that the plaintiff, a passenger, put his waistcoat, containing his wallet and money, under his pillow. It was the custom of the company to have the conductor and porter keep awake during the night, but on this night they went to sleep. In the morning the wallet and money were gone. It was held that plaintiff was entitled to recover their value.

In Pullman Palace Car Co. *v.* Gardner, 3 Pennv. (Pa.), 78, 16 Am. & Eng. R. Cas. 324, Gardner put his watch and pocketbook under the outside corner of the mattress of his berth, went to sleep, and next morning both money and watch were gone. The watchman, who should have been on duty, had been negligently absent, and Gardiner got a judgment. Woodruff, etc., Sleeping Coach Co. *v.* Diehl, 84 Ind. 474, 9 Am. & Eng. R. Cas. 294, 43 Am. Rep. 102, presents almost the same state of facts as the Gardner case, and, as there, a judgment against the company was affirmed.

In an action against a palace car company, it appeared that plaintiff was a passenger in one of defendant's sleeping cars; that he was told he would require to change cars on account of a wreck, that having partially dressed himself, he left his pocketbook containing a sum of money lying upon the bedding of his berth and went to the wash room, whence, having finished dressing, he went out of the car and forward to the wrecked train some 60 or 70 yards distant. Immediately on arriving there he missed his pocketbook

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and went back to recover it. He found the conductor and porter in the smoking room and informed them of his loss. All the other passengers had left the car before plaintiff, and they did not return to it until after he did. He testified that he was not absent from the car more than three or four minutes, and that when he left it no one remained in it except the conductor and porter. It appeared in evidence that a train brakeman had passed through the car but without stopping. The conductor, porter and passengers were searched, but the pocketbook was not found. *Held*, that a verdict for the plaintiff was sufficiently sustained by the evidence, and that it would not be reversed on appeal. *Pullman Palace Car v. Matthews*, 74 Tex. 654, 15 Am. St. Rep. 873. HENRY, J., who delivered the opinion of the court, said: "In the case of *Pullman's Palace Car Co. v. Pollock*, 69 Tex. 120, 34 Am. & Eng. R. Cas. 217, the following language of the supreme court of Massachusetts, used in deciding the case of *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267, 28 Am. & Eng. R. Cas. 159, 58 Am. Rep. 135, is quoted with approbation: 'While it [the sleeping car company] is not liable as a common carrier or as an innholder, yet it is its clear duty to use reasonable care to guard the passengers from theft; and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor.' We think this doctrine is as applicable to the case now before us as it was in the cases in which it was asserted. The evidence suggests either that the plaintiff did not lose any money or that the servants of the defendant, or one of them, found and appropriated it. The district court found the issue in favor of the plaintiff, and the judgment is sufficiently sustained by the evidence to make it our duty to affirm it, following the rule always enforced in such cases. The position in which plaintiff left his money was unquestionably an act of negligence on his part; and, if the evidence did not so conclusively exclude the idea of its having been taken by anybody except the servants of defendant, who were in charge of the car, he ought not to have had a recovery, because of his own negligence. The fact, however, that plaintiff's negligence furnished the temptation and opportunity to defendant's servants to take the money did not release it from its obligation to protect him against them."

The company cannot avoid liability for property lost or stolen through its negligence, by posting in the car a notice disclaiming responsibility, if it does not appear that the passenger saw the notice. *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267, 28 Am. & Eng. R. Cas. 148.

Negligence on the part of the company, or its servants, is not to be presumed from the mere fact of a loss, but must be shown. *Root v. New York Cent. Sleeping Car Co.*, 28 Mo. App. 199; *Tracy v. Pullman Palace Car Co.*, 67 How. Pr. (N. Y.), 154; *Carpenter v. New York, etc., R. Co.*, 124 N. Y. 53, 47 Am. & Eng. R. Cas. 421, 21 Am. St. Rep. 644; *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120, 34 Am. & Eng. R. Cas. 217; *Hillis v. Chicago, etc., R. Co.*, 72 Iowa 228, 31 Am. & Eng. R. Cas. 108; *Dargan v. Pullman Palace Car Co.* (Tex.), 26 Am. & Eng. R. Cas. 149; *Stearns v. Pullman Car Co.*, 8 Ont. Rep. 171, 21 Am. & Eng. R. Cas. 443. *Compare Railroad Co. v. Walrath*, 38 Ohio St. 461, 8 Am. & Eng. R. Cas. 371, 43 Am. Rep. 433; *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239, 40 Am. & Eng. R. Cas. 637.

Notes

And contributory negligence on the part of the complaining passenger may defeat his recovery. *Barrott v. Pullman's Palace Car Co.*, 51 Fed. Rep. 796; *Whitney v. Pullman Palace Car Co.*, 143 Mass. 243, 28 Am. & Eng. R. Cas. 147; *Root v. New York Cent. Sleeping Car Co.*, 28 Mo. App. 199; *Hillis v. Chicago, etc., R. Co.*, 72 Iowa 228, 31 Am. & Eng. R. Cas. 108; *Illinois Cent. R. Co. v. Handy*, 63 Miss. 609, 56 Am. Rep. 846; *Pullman Palace Car Co. v. Matthews*, 74 Tex. 654, 15 Am. St. Rep. 873.

In *Welch v. Pullman Palace Car Co.*, 16 Abb. Pr. N. S. (N. Y.), 352, Welch went to bed in a sleeping car, placing his overcoat in a vacant berth overhead. In the morning it was missing and he sued to recover its value, and got a judgment therefor, which was, however, reversed. In *Pullman Palace Car Co. v. Gaylord*, 23 Am. Law Reg. N. S. 788, Gaylord placed a scarf, having upon it a \$300 diamond pin, in the receptacle intended for articles of clothing and placed at the head of the berth. The pin was stolen, suit was brought, the company demurred, and on appeal the demurrer was sustained.

In *Whitney v. Pullman Palace Car Co.*, 143 Mass. 243, the plaintiff, while the train was stopping at a station, left the car for ten minutes, leaving his satchel upon the sill of one of the car windows, which could be reached from the outside through an adjoining open window. It was held that the plaintiff was guilty of negligence which contributed to his loss and that the action could not be maintained.

A passenger on a railway train entered a car, having in the pocket of his overcoat a sum of money, and gave the overcoat to the porter without mentioning the money, and the porter hung the coat in the passenger's berth. It was held that the money was in his own custody and at his risk; and the fact that soon afterwards an accident overturned the car, and on the passenger making his way out told the porter and brakeman of the railway company that the money was in the car, put no liability for the money on the company as gratuitous bailee, or otherwise, and it was not in such case responsible for the loss of the money. *Hillis v. Chicago, etc., R. Co.*, 72 Iowa 228, 31 Am. & Eng. R. Cas. 108.

In an action against a sleeping-car company for the loss of a passenger's property by theft, the evidence tended to show that the property of two passengers in one car was stolen from their berths during the same night; that the porter of the car was found asleep at an early hour of the morning in a position from which no view could be had of that part of the car in which the passengers were asleep; and that the porter was required to be on duty for thirty-six hours continuously, which included two nights. It was held that there was evidence of negligence on the part of the defendant proper to be submitted to the jury, *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267.

In *Root v. New York Cent. Sleeping Car Co.*, 28 Mo. App. 199, it appeared that the plaintiff, a passenger, deposited a purse containing nearly \$500 in his vest-pocket and placed his vest under his pillow, and that in the morning he left it there while in the toilet-room for five minutes. The court discussed the questions of negligence and contributory negligence, and deemed the facts to show "specific negligence on the part of the passenger touching the custody of his

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own valuables of a gross character," and that there was no case to go to the jury upon the ground of negligence.

In *Illinois Cent. R. Co. v. Handy*, 63 Miss. 609, 56 Am. Rep. 846, the court, in reviewing a charge to the jury, said, that if the passenger "carelessly and negligently left his pocket-book on the car when he reached his destination, and its contents were abstracted by persons other than the servants of the company, there would be no liability on the part of the company."

In the case of a loss of property which the passenger in the sleeping car retains in his possession, the liability of either the railroad company or the sleeping car company is limited to the amount of money reasonably necessary for the traveling expenses of the passenger upon the projected journey. *Barrott v. Pullman's Palace Car Co.*, 51 Fed. Rep. 796; *Illinois Cent. R. Co. v. Handy*, 63 Miss. 609, 56 Am. Rep. 846; *Root v. New York Cent. Sleeping Car Co.*, 28 Mo. App. 199; *Wilson v. Baltimore, etc., R. Co.*, 32 Mo. App. 682; *Blum v. Southern Pullman Palace Car Co.*, 1 Flip. (U. S.), 500, 3 Cent. L. J. 591. See also *Pullman Palace Car Co. v. Gardner*, 3 Penny. (Pa.), 78, 16 Am. & Eng. R. Cas. 324; *Carpenter v. New York, etc., R. Co.*, 124 N. Y. 53, 47 Am. & Eng. R. Cas. 421, 21 Am. St. Rep. 644.

And to the amount of baggage usually carried by passengers in their valises. *Hampton v. Pullman Palace Car Co.*, 42 Mo. App. 134; *Blum v. Southern Pullman Palace Car Co.*, 1 Flip. (U. S.), 500, 3 Cent. L. J. 591.

MELOCHE

v.

CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Michigan, March 1, 1898.)

Contract of Shipment—Conflicting Evidence—Question for Jury.—Where the evidence as to whether or not a contract of shipment was entered into was conflicting the question was properly submitted to the jury.

Carriers of Freight—Failure to Ship—Liability as Common Carriers.*—Where goods properly marked are placed inside of defendant's freight depot for immediate shipment, and defendant's agents agree to ship them on the following morning, defendant is liable as a common carrier.

Same—Effect of Rules and Customs.—A common carrier can not relieve itself from its liability under a contract of shipment by showing that a custom and its own rules required shippers to make out shipping bills giving a description of the goods.

*See note at end of case.

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ERROR by defendant to Marquette county circuit court. *Affirmed.*

W. S. Hill and Gad Smith (H. H. Field, of counsel), for appellant.

Potter & Sedgwick (A. B. Eldredge, of counsel), for appellee.

LONG, J. Plaintiff is the survivor of the firm of Meloche Bros., who, prior to August 25, 1896, carried on a drug business in the village of Ontonagon, this state. Some days before that time, the firm had closed its drug store, and packed the goods for shipment to Ishpeming, and in the forenoon of that day had them carted to the defendant's freight depot for shipment, over its road to Ishpeming. In the afternoon of the same day, a fire occurred in Ontonagon, destroying almost the entire village, and burning defendant's freight depot, together with the goods of Meloche Bros. This action is brought to recover the value of the goods so destroyed. The principal defense was that the goods had not been delivered to or accepted by the defendant at the time of the fire. The plaintiff testified that he delivered them at the depot on the morning of the day of the fire; that the packages were directed to "Meloche Bros., Ishpeming, Mich.," and that he requested immediate shipment; that the agent of the defendant agreed to ship them, and send a shipping bill next day to him, at Ishpeming. The defendant introduced testimony tending to show that the goods were not marked, and that, when plaintiff requested shipment, it absolutely refused to ship them until the same were marked. The court instructed the jury that the first question for them to determine was: "Were those goods, after being marked, as claimed by plaintiff, delivered to and accepted by the defendant, to be shipped to Ishpeming? If you say no, that is the end of the case. * * * If you say, 'Yes,' then the only other question for you to decide is, what was the value of the goods then and there?" The court further charged: "If there is a

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recovery at all, it must be because those goods were fully and fairly delivered into the possession of the defendant as common carrier, and accepted by it as such, under the promise that it would forward them to Ishpeming. That would constitute an acceptance by it as common carrier. Common carriers of freight are liable, whether careful or not. * * * The liability does not arise from negligence or want of care simply. It arises from their failure to make an absolute, safe carriage and delivery which they insure by their undertaking. * * * The fire was not such an act of God as would excuse the defendant."

Counsel for the defendant contends that the court was in error in refusing to direct a verdict for the defendant, and in the charge as given. It appears from the testimony of the plaintiff that, the day before the goods were left at

Contract of Ship-
ment—Conflicting
Evidence—Question
for Jury.

the depot, he went there, and had a talk with Mr. Mathews and Mr. Jones about the shipment, and ascertained the rate. After the goods were in the depot, he again went there, saw these parties, Mathews and Jones, from whom he had ascertained the rate the day before; that they then told him they could not ship the goods that day, as they had no cars. This was between 10 and 11 o'clock, and the train was to leave at 11 on which the plaintiff was going to Ishpeming. While at the depot, he found that the goods had been attached. He went to the justice's office, paid that claim, and returned to the depot. He claimed to have been gone but about 20 minutes. On his return, he again saw Mathews and Jones. As to what then took place, the plaintiff testified as follows: "I had a further conversation with Mr. Jones and Mr. Mathews. I said, 'Can you ship these goods?' They said they hadn't any car. 'We cannot ship them this morning.' * * * I asked them for a shipping bill or receipt. He says, 'I will send it to you by mail in the morning.' I had made no shipping bill. Q. You asked him for a receipt, and he told you he had no time? A. He had no time. He would send it to me by mail

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in the morning. * * * I asked him if I could depend on it, and he said, 'Yes.' " The plaintiff further testified that this was about 20 minutes before the train left, and that his brother and himself left on the train. This testimony is contradicted by the defendant, evidence being given that no contract was ever made; and considerable testimony was further given tending to show that the plaintiff, immediately after the attachment case with the justice was settled, took the train, and left Ontonagon, without further talk about the shipment of the goods, and that, in fact, the plaintiff had no time after he had settled the attachment suit to see about the shipment, as the train was about leaving when the plaintiff returned to the depot. But whether the contract was or was not made, as claimed by the plaintiff, was a question of fact for the jury. If the jury believed the plaintiff and his witnesses, they very properly found a verdict in his favor. Under these circumstances, the court was not in error in refusing to direct the verdict in favor of the defendant.

Under the plaintiff's claim,—and we must regard that claim as settled by the verdict of the jury,—the goods were properly marked for shipment, placed inside the defendant's freight depot for immediate shipment, with the agreement on the part of defendant's agents that they would be shipped on the following morning. They were only held till then for the accommodation of the defendant, because it had no car by which to ship on the day of delivery. It is well settled that under such circumstances the company was liable as a common carrier, as the liability as a carrier commences at the time of the delivery of the goods for immediate transportation. 5 Am. & Eng. Enc. Law (2d Ed.) 180, and cases there cited in note. The exclusive possession was in the defendant. The plaintiff had deposited the goods in the freight depot with the agreement that they should be shipped. It was not necessary to have a shipping bill or a contract in writing to make the liability of the defendant complete. Railroad Co. v.

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Adams, 15 Mich. 458; Railroad Co. v. Perkins, 17 Mich. 296.

But counsel for defendant contends that testimony was introduced on its part, which was uncontradicted, that the general custom of the defendant at Ontonagon was and had long been for shippers to mark goods intended for shipment; that it was the custom and duty of shippers to make out a shipping bill giving a description of the property, the number of packages, the name of the consignee; and that no property was ever received for shipment, or receipted for, except upon compliance with these conditions; that the rules of the company, which were introduced in evidence, required this; that plaintiff did not claim he was not familiar with this custom; that he conceded that he had made out no shipping bill; and that he had previously shipped goods, and had marked them. The court admitted this testimony as bearing upon the question whether the goods were marked or not, and no exception was taken to this ruling. The defendant certainly has no reason to complain of this ruling. The plaintiff was claiming under an express contract of shipment. The custom which defendant was permitted to show could not change this contract. Lamb v. Henderson, 63 Mich. 302, 29 N. W. 732.

Exception is also taken to certain portions of the charge. We have examined those matters, and find nothing therein which calls for discussion; nor do we think it important to discuss the questions relative to the ruling of the court upon the admission and rejection of certain evidence.

A motion for new trial was made and overruled. Exception is taken to that ruling upon various grounds. The only one we need discuss is that there was no sufficient evidence to support a verdict for \$2,500. We have examined this testimony with some care. One of the witnesses called by the plaintiff testified that the value of the stock was \$4,000. The plaintiff himself placed it much higher. Other witnesses stated that he had a large stock. The defendant's witnesses, upon

Note

estimates made, placed the value at from \$350 to \$500. The testimony as to value is very conflicting, and we are not prepared to say that the jury placed too high a value upon it. Plaintiff described the different goods in the store, giving them in detail, with values. The court below saw the witnesses, heard the testimony, and, upon a full consideration of the motion for new trial, denied it. We find nothing in the case which should disturb this finding. The judgment must be affirmed. The other justices concurred.

NOTE.

Carriers of Freight—Delay in Shipment—Liability as Common Carriers.—Where goods are delivered to a carrier for immediate transportation, its liability as a common carrier commences upon the delivery. *St. Louis, etc., R. Co. v. Knight*, 30 Am. & Eng. R. Cas. 88, 122 U. S. 79; *St. Louis, etc., R. Co. v. Murphy*, 60 Ark. 333; *Merriam v. Hartford, etc., R. Co.*, 20 Conn. 354, 52 Am. Dec. 344; *Grand Tower Mfg. etc., Co. v. Ullman*, 89 Ill. 244; *Michigan Southern, etc., R. Co. v. Shurtz*, 7 Mich. 515; *Blossom v. Griffin*, 13 N. Y. 569, 67 Am. Dec. 75; *Wade v. Wheeler*, 47 N. Y. 658; *Clarke v. Needles*, 25 Pa. St. 338; *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270; *East Line, etc., R. Co. v. Hall*, 64 Tex. 615.

Where goods are delivered to a railroad company for immediate shipment, and are accepted by the company and placed in its freight-house, and the shipment is delayed because of the inability of the company to furnish cars, and while in the freight-house the goods are consumed by fire, the company is liable, notwithstanding that the duty to load the goods on the cars rested upon the shippers. *London & L. Fire Ins. Co. v. Rome, W. & O. R. Co.*, 61 Am. & Eng. R. Cas. 225, 144 N. Y. 200.

Where a company receives goods and holds them for its own convenience until enough are made up for a load, it is liable for a loss that occurs by fire while being so held, where they might have been forwarded by another route, although nothing was said as to the route by which they were to be sent. *Lawrence v. Winona, etc., R. Co.*, 15 Minn. 390, 2 Am. Rep. 130.

Pierce v. Southern Pac. Co

PIERCE

v.

SOUTHERN PAC. CO.

(Supreme Court of California, Feb. 23, 1898.)

Carriers of Freight—Contracts Limiting Liability—Laws of Foreign States—Presumption.—The law of the state where a contract of shipment was entered into will be presumed, in the absence of proof, to be the same as that of the state where it is sought to be enforced.

Same—Damage to Trees from Cold in Transit—Negligence.*—A contract of shipment by which the shipper insures a railroad against claims for loss or damage which may be incurred by reason of delay in transportation, or any other cause arising out of responsibility as master over its agents (gross or wanton negligence excepted) incident to said shipments does not relieve the railroad from liability for the destruction of orange trees which it had unnecessarily ordered to be transported over a route upon which the company was chargeable with notice of the danger of their destruction by cold.

Measure of Damages—Special Contract.—By a special contract the price of the goods at the point of shipment may be made the measure of damage for their subsequent loss through the carrier's negligence; and the fact that no invoice price was made out and agreed upon at the time the goods were shipped is immaterial.

Affirmed.

PER CURIAM. The facts of this case are fully stated in the opinion of department 1. 47 Pac. 874. When that opinion was filed, both parties petitioned for a rehearing in bank, the appellant insisting that it had proved a valid contract exempting it from all liability, and the respondent contending that the rulings of the lower court with reference to the measure of damages were correct. For the purpose of further considering these two questions a rehearing was granted. Sections 2174 and 2175 of the Civil Code read as follows: "The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract." Section 2174.

*See *Pierce v. Southern Pac. Co.* (Cal.), 7 Am. & Eng. R. Cas., N. S., 564, and *notes*, p. 573.

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“A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or wilful wrong of himself or his servants.” Section 2175. In the absence of proof, we presume that the law of Florida is the same. The contract in question here, which was executed in Florida, contains the following stipulation: “Now, therefore, said shippers, for themselves and consignees, do hereby insure said Florida Midland Railway Company, and all lines over which said shipments may pass between points of shipment and destination, against claims by loss or damage which may be incurred by reason of delay in transportation, or any other cause arising out of responsibility as master over its agents or servants (gross or wanton negligence excepted) incident to said shipments.” The appellant contends that it was empowered by section 2175 of the Civil Code to contract for an exemption from all liability except for gross negligence, fraud, or wilful wrong of itself or servants; that such contract, based upon a valid consideration, was entered into in its behalf with the respondent; and that it was clearly shown and conceded by the court that it was not guilty of gross negligence. When section 2175 of the Civil Code was enacted, section 17 of the same Code read as follows: “There are three degrees of negligence: (1) Slight—which consists in the want of great care and diligence; (2) ordinary—which consists in the want of ordinary care and diligence; (3) gross—which consists in the want of slight care and diligence.” In 1874 this section was repealed outright, and the effect of this repeal upon the construction and operation of section 2175 is one of the questions which has been argued on the rehearing. It is not necessary, however, to decide this question; for, conceding that the distinction between gross and ordinary negligence still obtains so far as stipulations for exemption in contracts of common carriers are concerned, we do not consider this a case for the application of the doctrine. The loss and damage

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for which plaintiff sues was not for delay in transportation, and the exemption from liability claimed by the defendant must be based upon the general words "or any other cause arising out of responsibility as master over its agents or servants," etc. This language, which is of very doubtful and ambiguous meaning, must be construed most strongly against the defendant, and even under a less exacting rule could not be held to mean anything more than that the railroad company was not to be liable for the negligence or misconduct of its servants or agents. But in this case it is clearly

Same—Damage to
Trees from Cold in
Transit—Negli-
gence.

shown that the loss and damage complained of was solely due to compliance by the agents and servants of the defendant with an order emanating from headquarters; that is to say, an order issued by the corporation itself through its proper organs. This order embraced all freight east of a certain point, including these cars loaded with orange trees, which, as a matter of common knowledge, are easily killed by that degree of cold which, as a matter equally of common knowledge, they would be likely to encounter at the end of February on the route over which they were transported. Our conclusion upon this point is that the stipulation in this contract, allowing it to be valid, does not extend to or embrace the act of the corporation in ordering these trees shipped through Utah and Nevada.

As to the point made by respondent in his petition for a rehearing, we are satisfied that the conclusion reached by the department was correct.

Measure of Dam-
ages—Special
Contract.

The ordinary measure of damages for breach of a carrier's obligation to deliver freight is the value of the goods at the time and place of delivery (Civ. Code, § 3316); but this liability may be limited by special contract (*Id.* § 2174); and here there was a special contract signed by the plaintiff making the invoice price at the point of shipment the measure of damages. It is true, there was no invoice price actually made out and agreed upon at the time the trees were shipped; but this clause cannot for

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that reason be treated as meaningless and inoperative. It should receive a reasonable construction, and the most reasonable construction of which it is susceptible is that by invoice price was meant the actual value of the trees at the point of shipment when loaded and ready for transportation. To this, of course, is to be added, in fixing the damages, the freight actually paid, and interest on the whole amount. Judgment and order reversed, and cause remanded.

REIDEL

v.

PHILADELPHIA, W. & B. R. Co.

(*Court of Appeals of Maryland, Jan. 12, 1898.*)

Injuries to Trespassers on Track—Contributory Negligence—Speed in Excess of Ordinance—Negligence Per se.*—Plaintiff was injured by defendant's train while attempting to cross its track at night at a point where there was no crossing. The only negligence that defendant could be charged with was that its train was running at the time of the accident at a greater rate of speed within city limits than that permitted by an ordinance of the city. *Held*, that such excessive speed is not, *per se*, such negligence as will afford a right of action; and that a verdict for defendant was properly directed.

APPEAL by plaintiff from circuit court, Hatford county. *Affirmed.*

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, ROBERTS, and BOYD, JJ.

Albert Constable and Jas. J. Archer, for appellant.

Thos. I. Donaldson, Thos. H. Robinson, and L. Marshall Haines, for appellee.

FOWLER, J. This is an action to recover damages for injuries to the plaintiff alleged to have been caused

*See *Sutherland v. Cleveland, C., C. & St. L. Ry. Co. (Ind.)*, 8 Am. & Eng. R. Cas., N. S. 424, and *notes*, p. 428.

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by the negligence of the defendant railroad company on the evening of December 28, 1891, at Wilmington, Del. The suit was commenced in the circuit court of Cecil county on the 5th of December, 1894. On the 14th of January following, the declaration was filed. The case appears to have been continued by consent from term to term until the 25th of March, 1897, when the plaintiff filed a suggestion and affidavit for removal, and the record was thereupon sent to the circuit court for Kent county. On the 20th of April following, the defendant filed a suggestion for removal, and the record was accordingly sent to the circuit court for Harford county, and was filed there on the 26th of April, 1897; and the trial was commenced in that court on the 8th of June of the same year, and on the 11th of the same month the learned judge below instructed the jury that there was no evidence in the case legally sufficient to entitle the plaintiff to recover. On the 23d of June, judgment on the verdict was entered, and the same day the defendant appealed.

The sole question involved in this appeal is whether the jury were properly instructed to find a verdict for the defendant. We think the learned judge below was quite right in taking the case from the jury. The general principles which must govern the decision of this case are well settled in this state, and it is unnecessary, therefore, to look for authorities in other states, however interesting and instructive they may be. A number of those cited by the appellant (notably, those reported in 89, 107, and 175 Pa. St.)* are cases which relate to the principles which are well settled in reference to injuries inflicted by a railroad company at public crossings. Such adjudications have no application to the case before us, for, when injured, the plaintiff was, and is conceded to have been, a trespasser on the track of the defendant company, where it had "the exclusive right of way for the operation of its trains." *Baltimore & O. R. Co. v. State*, 69 Md. 555, 16 Atl.

**Railroad Co. v. Werner*, 89 Pa. St. 59; *Schum v. Railroad Co.*, 107 Pa. St. 8; *Philpott v. Railroad Co.*, 175 Pa. St. 570, 34 Atl. 856.

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212. But, inasmuch as the legal sufficiency of the evidence is questioned, it will be necessary to examine it. Only two witnesses testify in regard to the facts of the accident,—the plaintiff and the witness Woerner, who testified in his behalf. It appears that the injury complained of was received at Wilmington, in Delaware, while the plaintiff was in the act of crossing the tracks of the Baltimore, Philadelphia & Wilmington Railroad Company at the foot of Second street, in that city. He was at the time of the injury, and had been for some years, employed by it as a night laborer at its roundhouse. According to his own testimony, on the 28th of December, 1891, he left his home, in Wilmington, about a quarter before 6 o'clock in the evening, for his work, passed along Second street in the same way he had always done during all the time he had worked for the company, and when he came near to the end of that street, which terminates at the railway of the defendant, there being no crossing there, he stopped, and looked up and down the railroad, to the right and left, but did not see or hear anything. He then walked towards the railroad, and crossed the first three side tracks; and, when he passed out from behind some freight cars on one of the side tracks, he again looked up and down the railroad, but neither saw nor heard anything. He then walked across the first main, or south-bound track, and was in the act of stepping on the north-bound track when he saw a train approaching him on that track, and going towards Philadelphia. When he first saw this train, it was nearly upon him, or, as he says, about a car's length distant from him, and running at a speed, according to his testimony, of from 10 to 12 miles an hour. Upon seeing this train, he drew back to let it pass, and, before he could escape, another train, running at a speed of 20 miles an hour, appeared on the south-bound track; and he stood on the space between the two tracks, trying to make himself slim. But he was knocked down and seriously injured—whether by the north or south-bound train, he does

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not say. It appears that both trains reached the spot where he was standing about the same time. The night, he says, was cold and dark. He heard no whistles or bells from either train. However, he qualifies this by saying he was too excited, and did not know anything that was going on around him, which, under the circumstances, was but natural. It appears from the testimony that quite a number of employees of the defendant were in the habit of walking across the tracks at the foot of Second street, going to and returning from their work at the defendant's roundhouse, but this does not alter the fact that the plaintiff was a trespasser. *Stebbing's Case*, 62 Md. 517; *Allison's Case*, *Id.* 487. It has been suggested that the plaintiff was an employee of the defendant, and, if so, he might be subjected to the rule pertaining to the rights of fellow servants, and for this reason, if for no other, he could not recover; but this defense was not relied on by the defendant, and we will not, therefore, consider it. The remaining testimony relating to the facts of the accident is that of Anthon Woerner, a fellow workman of the plaintiff, who, according to his testimony, must have reached the end of Second street about the time the plaintiff started to cross the tracks. He was late in getting to his work, the hour he was required to be there being 6 o'clock. He, also, was in the habit of crossing at the foot of Second street, and on this occasion he said he ran and tried to get over before the north-bound train came up, because he had heard the 6 o'clock whistle, but there was a car there, and it was impossible for him to cross. He heard the whistle of the north-bound train before he got to the railroad tracks, and about the time he got there he heard the whistle of the south-bound train. He was fortunately too late, in his opinion, to attempt to cross before the north-bound train came up. On cross-examination he said that as soon as he got to the corner he heard the south-bound train coming in, and it was coming very fast,—in his opinion, at the rate of 12 to 15 miles an hour. Some one called his attention to a man who

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was on the track, and in danger, whereupon he looked through some cars standing on the side tracks, and saw, as he says, "only the man by his legs and his dinner kettle." This witness confirms the plaintiff's testimony that the trains met where the plaintiff was standing—the one going south running, as he supposed, about twice as fast as the one going north; the speed of the latter being 6 or 8 miles an hour. He thinks the south-bound train was 300 or 350 feet up the track when it whistled, but he appears to have heard the train coming as soon as he arrived at the crossing.

Both of these witnesses were examined and cross-examined at much length, but we have given enough of their testimony to show that, notwithstanding the defendant appears to have given the ordinary signals, yet it was guilty of negligence in violating the ordinance of the city of Wilmington by running on this occasion one, if not both, of its trains at a speed greater than was allowed by ordinance within the city limits. It is settled law that in all such cases as this the violation of a municipal ordinance regulating the speed of trains within certain limits is not, *per se*, such negligence as will afford a right of action. The person injured "must have been in a position to entitle him to the protection that the ordinance was designated to afford, and he must show how, and under what circumstances, the duty arose to him personally, and how it was violated, by the negligence of the defendant, to his injury." *Stebbing's Case*. It is quite immaterial to the case of the plaintiff that the defendant company was guilty of violating the ordinance, "unless it be shown that the injury complained of was occasioned by such unauthorized speed of the train, without any direct contributory negligence on the part of the plaintiff himself." If it appears that he knew, or could have known by the exercise of his powers of observation, either by sight or hearing, of the near approach of the trains, in time to get out of the way of danger, and failed to do so, he has no right of action, notwithstanding the violation by the defendant of the ordinance. This rule

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was applied by CHIEF JUSTICE ALVEY in the case just cited, in clear and forcible language. And that same eminent judge, in the more recent case of *Baltimore & O. R. Co. v. State*, 69 Md. 554, 16 Atl. 213, in delivering the opinion of this court, again reiterated and enforced the rule applicable to trespassers who are injured on the tracks of a railroad. In that case it is said: "It is true, the train was running at a much higher rate of speed than that allowed by the ordinance of the city, and in this, it is conceded, there was negligence. But this disregard of the ordinance, and consequent act of negligence on the part of the defendant, did not excuse or in any way justify the glaring act of negligence on the part of the deceased. That has been ruled in many cases, and is now the settled law." The conduct which we characterized in the case just cited as a glaring act of negligence consisted in walking in open daylight on the track of the railroad, facing an approaching train. But in *Bacon's Case*, 58 Md. 485, the opinion of the court having also been delivered by CHIEF JUDGE ALVEY, the facts were more like the present case. There the time of the accident was night, as here, and the persons injured were, as here, also trespassers, and, as we have said, were there assuming all the risks of the perilous position in which they had voluntarily placed themselves; there being no duty imposed upon the defendants employed on the train to keep a lookout for them. Under these circumstances, we said: "The night being dark, they must have known that they could not depend for their safety upon being seen by those in charge of the train, beyond the reflection of the headlight. They knew perfectly well that their safety depended alone upon the use of their senses, and the exercise of a proper degree of caution. It is difficult to suppose they did not see the approaching train, with its glaring headlight confronting them, in time to enable them to step from the track. If the deceased did see or hear the approaching train in time, and failed to get out of the way, he was certainly guilty of the grossest negligence; and, if he did not

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see or hear the approaching train, it must have been because he did not use his senses for his protection, and he was therefore guilty of negligence, and that negligence directly contributed to his death." Now, what are the facts of this case? As we have seen, the plaintiff on a dark evening in December, attempted to cross the defendant's tracks at a place where, the moment he stepped upon them, he became, in contemplation of law, a trespasser. He says there were three rows of cars standing on the side tracks, and he went behind those cars, and stood there, and looked up and down to see if he could see a train, and, seeing nothing, he walked across the two rails of the south-bound track, and just as he put his foot on the north-bound track he saw the train for Baltimore about a car's length distant from him. He stepped back into the space between the two tracks, and was then between the two trains, both going by him at the same time. He was then in a most dangerous position, but he was there by his own fault. It is apparent, from the proximity of the trains to the plaintiff as he put his foot upon the rails of the north-bound track, that, if he had made proper use of his senses, he must have seen or heard the trains. He says he looked, and did not see; but it is impossible for him not to have seen or heard one train or the other, for they were there, and, if he did not see or hear them, it is his misfortune. "If he did not see or hear the approaching train, it must have been because he did not use his senses." Bacon's Case. It seems to us the conduct of the plaintiff was reckless. His knowledge of the locality should have persuaded him—and would have, we think, induced any prudent man—to have waited until he could, by looking, or if he could not see, by listening, convince himself that no trains were approaching. If it be conceded that it be possible that he did not and could not see the approaching trains, yet that he did not hear them is incredible. He must have heard but he did not heed. The plaintiff, like others who were in the habit of crossing at the place, had become so familiar with its dangers that

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they no longer had any effect upon him. It appears that one of the witnesses was in the habit of getting over the cars which stood on the side tracks, and thus obstructed his way across the defendant's road. Familiarity with danger has in this case had its usual effect, and the plaintiff had the misfortune of being added to the long list of those who become reckless of their own safety by daily contact with perils which in others would inspire fear, caution, and prudence.

In the view we have taken, the remaining exceptions, based upon the refusal to admit the testimony of the witness Moreland, become unimportant; for our conclusion is based upon the conceded fact that the defendant was guilty of negligence in running its train at a greater speed than allowed by the ordinance, and, as we understand it, the rejected testimony was offered to show that there was such a violation of the ordinance. Judgment affirmed, with costs.

DRIVER

v.

ATCHISON, T. & S. F. Ry. Co.

(*Supreme Court of Kansas, Feb. 5, 1898.*)

Excessive Speed*—Ordinance—Negligence—Instructions.—Plaintiff cannot complain that the trial court failed to instruct the jury that defendant was guilty of negligence in running its train within the limits of a city at a rate of speed in excess of that permitted by an ordinance of such city, no such instruction having been requested.

ERROR by plaintiff to district court, Reno county.
Affirmed.

*As to Speed in Excess of Ordinance, see *Reidel v. Philadelphia, W. & B. R. Co.* (Md.), *ante*, and *foot-note*.

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B. O. Davidson and *C. M. Williams*, for plaintiff in error.

A. A. Hurd and *Stambaugh & Hurd*, for defendant in error.

PER CURIAM. The only questions presented in this case arise on the instructions. It is contended that the court should have instructed that running a train through the city of Nickerson at a rate of speed exceeding six miles an hour was negligence, because in violation of an ordinance of the city. The seventh instruction submitted to the jury the question whether the defendant was guilty of negligence in running its train at too high a rate of speed, as one of fact, to be determined from the evidence. The instruction as given is not erroneous. Conceding the ordinance to be valid, it would be incumbent on the defendant to run its train with reference to existing conditions at and around the crossing at which the plaintiff was injured. It might be negligence to run the train at the rate of six miles an hour. No instruction with reference to the ordinance was asked by the plaintiff, and the court's attention does not appear to have been called to this precise question. The instruction given is not erroneous. The instructions from the eleventh to the eighteenth, complained of by counsel, state the law correctly, and are applicable to the facts disclosed by the record. They are in accordance with prior decisions of this court, and do not present any new question requiring elaboration in an opinion. The judgment is affirmed.

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SUTTON

v.

CHICAGO, ST. P. M. & O. RY. CO.

(Supreme Court of Wisconsin, Jan. 11, 1898.)

Accident at Country Crossing—Rate of Speed—Negligence Per Se.*—Running a railroad train at a country crossing at the rate of 40 miles an hour is not negligence *per se*.

Construction of Railroads Across Highways—Evidence.—The testimony of witnesses acquainted with the locality before the construction of the railroad that the existence of the highway at such point antedated the construction of the railroad was sufficient *prima facie* to establish such fact.

Same.—Though the law of Wisconsin requires a railroad company constructing its road across a highway to leave the highway in as good a condition, substantially as it was before the construction of the railroad, a railroad company cannot be held liable for an accident caused by a ditch at such a crossing, unless it appears from the evidence that the ditch was constructed by the company or rendered necessary by the construction of its road.

Crossing Signals—Evidence.—A finding that the statutory signals were not given at a crossing, not being sustained by the evidence, was erroneous.

Credibility of Witness—Prejudicial Remarks.—Where the deposition of a witness for plaintiff could not be used because of his presence at the trial, a statement, in substance, by plaintiff, after examining such witness, that there was such variance between his deposition and testimony as to show that he had been tampered with and corrupted, was sufficient ground for reversal of a judgment for plaintiff, the judge not having cautioned the jury to disregard such statement.

Attorneys—Non-Residence—Judicial Notice.—The supreme court will not take judicial notice of the non-residence of one who signed the notice of appeal as attorney for appellant and whose name appears upon its roll of attorneys.

APPEAL by defendant from Monroe county circuit court. *Reversed.*

This is an action to recover the value of a team of horses killed by a collision with defendant's passenger train upon a country highway crossing about half a mile northwest of the city of

Case Stated.

*See note at end of case.

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Augusta, in Eau Claire county, on the 19th day of March, 1892. The highway in question runs directly east and west, and is a main road, traveled extensively. The railway track crosses the highway obliquely, from northwest to southwest, and the highway is slightly turnpiked up above the natural level of the ground at the crossing. On the day of the accident a young man named Humes was driving along this highway from west to east. He was driving a young team belonging to his father, hitched to a wagon with a long reach and without any box. He was riding upon the rear hounds of the wagon, or upon the rear bolster, and was leading behind a heavy team belonging to the plaintiff, which was hitched to a wagon with a wood rack thereon. The young man approached the crossing from the west at about noon, and, as he crossed the track, the rear team (being the plaintiff's team) was struck by the defendant's regular passenger train coming from the northwest, at a speed of 40 miles an hour, and, as a result of the collision, the team was killed, the rear wagon and harness destroyed, and the young man was instantly killed. The complaint alleged negligence on the part of the railway company in failing to restore the highway to its former state, and in failing to properly fence the same; also in running its train at a dangerously high rate of speed; also in failing to give the proper signal, by sounding the whistle or ringing the bell. The circuit judge charged the jury that there was no evidence that the train was running at an unlawful rate of speed, and that they could not find negligence because of the speed of the train, nor because of failure to fence, but submitted to the jury the other alleged grounds of negligence. A general verdict was returned for the plaintiff, fixing the damages at \$508, and from judgment thereon the defendant appealed.

L. K. Luse, for appellant.

J. J. Sutton, in *pro. per.*

WINSLOW, J. (after stating the facts). The defendant claimed upon the trial below that the evidence

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failed to show any negligence upon its part in any of the ways claimed by the plaintiff, and the questions arising upon this broad claim are properly preserved by exceptions, for review upon this appeal. As stated in the statement of the case, negligence causing the injury was claimed by the plaintiff in four respects, *viz*: (1) In running the train at a dangerously high rate of speed; (2) in failing to properly fence its right of way; (3) in failing to restore the highway to its former condition; and (4) in failing to give the proper signals.

1. The court finally took from the jury the question of the alleged negligent rate of speed of the train, and charged that the evidence did not show negligence in this respect. This was plain-ly right. The crossing was in the country, where there was no limitation, either by statute or ordinance, upon the speed of trains. Under such circumstances, it cannot be said that it is negligence to run a train at or about the speed of 40 miles per hour, or that negligence can be inferred from such fact alone. *Mills & Le Clair Co. v. Chicago, St. P., M. & O. Ry. Co.*, 94 Wis. 336, 68 N. W. 996.

Accident at Country
Crossing—Rate of
Speed—Negligence
Per Se.

2. The court also charged that there could be no recovery upon the ground of failure to properly fence the right of way, and this was so clearly correct that we shall spend no time in discussing it, but simply say that there was no evidence tending to show that either a fence, or the absence of a fence, had anything to do with the accident.

3. The statute (Rev. St. § 1836) requires every railway company constructing its road across or upon any highway to restore such highway to its former state, or to such condition that its usefulness shall not be materially impaired. It has been held by this court that this provision applies only to cases where the railroad is built upon or across an already existing highway. *Chicago, M. & St. P. Ry. Co. v. City of Milwaukee* (present term) 72 N. W. 1118. In the present case it is claimed

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dence.

that there was no evidence to show that the highway in question was an existing highway at the time of the construction of the railroad, and hence that the statute above referred to had no application. Upon this point it is sufficient to say that two witnesses acquainted with the locality testified, in substance, that they were acquainted with the highway at this point before the railroad was built, and one of them stated that it was traveled at that time. We regard this testimony as sufficient to establish, *prima facie* at least, the fact that the highway existed at the time the railroad was constructed over it. We do not think it was necessary for the plaintiff to introduce the record of the laying out of the road, in the absence of any testimony to the contrary. The defect which it was claimed existed in the highway, and for which it was claimed the defendant was responsible, was that there was a deep ditch within the limits of the highway and of the railroad right of way, just south of the traveled portion of the highway, as it approaches the point of crossing. There was some testimony which tended to show that the young man heard the train, and stopped his horses within a short distance of the crossing, and that they plunged somewhat, and went partially into the ditch, and then came out of it, throwing the young man from his seat to the ground when about crossing the track, just ahead of the train, and so it is claimed that the existence and presence of the ditch was a direct cause of the accident. The radical difficulty with this claim is that it is nowhere shown that the ditch was constructed or caused by the building of the railroad. As far as the evidence shows, it may have existed at the time the railroad was built. Certainly it was necessary for the plaintiff to show that the railroad company failed in performing its duty under the statute, and in so failing caused or made the ditch. There being an entire absence of such evidence, there was nothing to go to the jury upon this ground of negligence.

Same.

4. As to the alleged failure to give the statutory

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signals for the crossing, there was really no evidence which would support a verdict to the effect that the proper signals were not given. No witness testified that the bell was not rung, and two witnesses testified, simply, that they did not hear the whistle blown 80 rods before reaching the crossing, but did hear it blown at a point about 45 rods west of the crossing. Neither of these witnesses was listening for the signal, or had his attention directed to the subject; and under the rule stated in *Wickham v. Railroad Co.*, 95 Wis. 23, 69 N. W. 982, this evidence will not support a verdict that the signal was not given. On the other hand, there was positive evidence, not only on the part of the train employees, but by other disinterested witnesses, that the proper signals were given. In this condition of evidence there was nothing to go to the jury upon this claim of negligence.

These conclusions necessitate reversal of the judgment. There are some other contentions made, however, which seem to require attention. The plaintiff called as a witness one Bennett, who was upon the highway at the time of the accident, and was an eyewitness of it. It seems that Bennett's deposition had been previously taken by consent of counsel on both sides, under an oral stipulation that it might be read upon the trial. However, the witness was present at the trial, and so the reason for using it no longer existed, and, under the statute, it was no longer admissible. Rev. St. § 4089. Shortly after beginning the examination of Bennett, Mr. Sutton, who conducted his case in person, stated that he wished to read from the deposition, and to cross-examine the witness, which proceeding was duly objected to. Mr. Sutton then proceeded in his endeavor to get the deposition in evidence, stating, in presence of the jury, that "the witness' evidence is so far at variance with his deposition that it is an outrage on the court"; that he had expected it, ever

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since he had seen the witness in close consultation with Mr. Luse; that the witness had been "handled" by defendant's claim agent and attorney; and that he (Sutton) knew what he was talking about, and that for that reason he was not surprised when the witness came into court, and made these statements now. After considerable of this sort of talk on the part of counsel, and a number of reiterations in various ways of the charge that the witness had been tampered with, the court refused to allow the deposition to be read, but permitted Mr. Sutton to treat the witness as an adverse witness, and to cross-examine him as to what he testified to in his deposition. Whether this was a case where, in the exercise of a sound discretion, the plaintiff should have been allowed to cross-examine his own witness, may be doubtful (*Bank v. McSpedon*, 15 Wis. 629,) and we do not deem it incumbent upon us to decide that question. Certain we are, however, that the course of the plaintiff, in making repeated charges that the witness had been corrupted by the defendant's agent, was entirely unjustifiable, and ought, of itself alone, to call for a reversal of the judgment. Such charges, made without the sanction of an oath, are no part of proper legal warfare, and at the same time they are eminently calculated to mislead and prejudice the jury. A case that cannot be won fairly upon the evidence, by the use of legal and lawyer-like methods, presumably does not deserve to be won. The same criticism applies to a remark injected into the case at another stage of the trial, to the effect that the company had already settled for the death of the young man. It is true that, upon objection being made to the last-mentioned remark, the court said that it should not be mentioned; but we have found no ruling or caution to the jury with reference to the other remarks, and we cannot but regard them as coming clearly within the rule laid down by this court in the case of *Andrews v. Railway Co.*, 96 Wis. —, 71 N. W. 372.

A suggestion was made that the appeal should be

Note

dismissed for the reason that Mr. Luse, who signed the notice of appeal, was not at that time a resident of this state. Mr. Luse's name appears upon the roll of attorneys of this court. There is nothing in this record to show that he has changed his residence, and certainly the court cannot take judicial notice of the fact. What would be the effect of such a change, if it were shown to have taken place, is not determined. Judgment reversed, and action remanded for a new trial.

Attorneys - Non-
Residence - Judi-
cial Notice.

NOTE.

Speed at Crossings—Negligence.—It is not negligence for a railroad company to run its trains over a public crossing in the open country at the rate of thirty miles an hour. It is only the force of special circumstances that requires a less rate of speed. *Reading & C. R. Co. v. Ritchie*, 19 Am. & Eng. R. Cas. 267, 102 Pa. St. 425. No conceivable rate of speed will amount to negligence *per se*.

It is now well settled that no rate of speed in crossing a highway with a railway train is negligence *per se* at common law. *Reading, etc., R. Co. v. Ritchie*, 102 Pa. St. 425, 19 Am. & Eng. R. Cas. 267, and *note*; *Powell v. Mo. Pac. R. Co.*, 76 Mo. 80, 8 Am. & Eng. R. Cas. 467; *Goodwin v. Chicago, etc., R. Co.*, 75 Mo. 73, 11 Am. & Eng. R. Cas. 460; *Wallace v. St. Louis, etc., R. Co.*, 74 Mo. 594; *Artz v. Chicago, etc., R. Co.*, 44 Ia. 284; *Burlington, etc., R. Co. v. Wendt*, 12 Neb. 76; *Chicago, etc., R. Co. v. Lee*, 68 Ill. 576; *Chicago, etc., R. Co. v. Harwood*, 80 Ill. 88; *Cohen v. Eureka, etc., R. Co.*, 14 Nev. 376; *Grand Rapids, etc., R. Co. v. Huntley*, 38 Mich. 537; *Grows v. Maine, etc., R. Co.*, 67 Me. 100; *Bennis v. Connecticut, etc., R. Co.*, 42 Vt. 375; *Zeigler v. Northeastern R. Co.*, 5 So. Car. 222, 7 So. Car. 402; *Telfer v. Northern, etc., R. Co.*, 30 N. J. L. 188; *Terre Haute, etc., R. Co. v. Clark*, 73 Ind. 168; 6 Am. & Eng. R. Cas. 84; *Warner v. N. Y. Cent. R. Co.*, 44 N. Y. 465; *Commonwealth v. Fitchburg R. Co.*, 126 Mass. 472.

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WESTERN & A. R. Co.

v.

BROWN.

(*Supreme Court of Georgia, July 21, 1897.*)

Killing Stock on Track—Damages—Interest.*—As matter of law, unliquidated demands, arising *ex delicto*, do not bear interest, and on a suit to recover the value of property which has been injured or destroyed the jury cannot legally find a given amount for principal, with an additional amount as interest.

Same.—The jury may, in the lawful exercise of their power, add to the value of property destroyed a sum equal to the interest on such value; but such sum must be found and returned as damages, not as interest.

Same—Liability—Question for Jury.—In the present case the question of liability was one for the jury, and their verdict is not against the evidence. The charge of the court did not authorize the rendition of a verdict bearing interest on the principal found. The verdict, as corrected, expressed the real finding of the jury, and will not, therefore, be disturbed.

Same—Arguments of Counsel.—There was no error in ruling that the plaintiff had the right to open and conclude, notwithstanding the admission made by the defendant, the same not making out a complete *prima facie* case for the plaintiff.

(Syllabus by the Court.)

ERROR by defendant from Whitfield county superior court. *Affirmed.*

The following is the official report:

Brown sued the railroad company for damages alleged to have been sustained by him by reason of the negligent killing of a jennet belonging to him by a locomotive and train of the defendant. Case Stated.

The amount sued for was \$500. The defendant admitted the killing, but denied that the jennet was worth \$500, or any other large sum, and denied that the killing was due to any fault or negligence on the part of the defendant or its servants. There was a verdict for the plaintiff for \$108.16 and costs of suit,

*See note at end of case.

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and, the defendant's motion for a new trial being overruled, it excepted.

The motion for a new trial contained, in addition to the general grounds, the following: The court erred in charging: "If you find under the rules given you that the plaintiff is entitled to recover, you will then, in measuring the damage, find from all the testimony what the jennet was worth at the time she was killed; and to this amount you may, if you see fit, add interest up to the present time." The court erred in the following ruling: When the jury returned with their verdict, it was substantially in this form: "We, the jury, find for the plaintiff \$100 principal, and eight dollars and sixteen and two-third cents interest;" when counsel for plaintiff moved the court to be allowed to consolidate the two in one lump sum, which the court, over the objection of defendant's counsel, allowed done. Movant specifies as error in the foregoing charge of the court and in the action of the court in receiving the verdict that in an action for unliquidated damages no interest is allowed, nor has the court power to receive a verdict which has been increased by the addition of interest. The court erred in ruling that plaintiff was entitled to the opening and conclusion, defendant's attorneys stating to the court, before the argument began, that defendant admitted the killing, and the law then implied negligence, which made a *prima facie* case for recovery.

Payne & Tye and *R. J. & J. McCamy*, for plaintiff in error.

McCutchen & Shumate and *Shumate & Maddox*, for defendant in error.

LITTLE, J. The official report states the facts.

1. It is not necessary to cite authorities for the proposition that, as a matter of law, unliquidated demands arising *ex delicto* do not bear interest. Our Code (section 3800) provides that "in all cases where an amount ascertained would be the damages at the time of the breach, it may be increased by the addition of legal

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interest from that time till the recovery." This provision applies in a suit for damages for breach of contract, but in cases arising *ex delicto* for the value of property destroyed, where the measure of damage is the value of the property, the same reasoning would apply the same rule. Railroad Co. v. McCauley, 68 Ga. 818; Railroad Co. v. Sears, 66 Ga. 499; Banking Co. v. Crawley, 87 Ga. 192, 13 S. E. 508. It is understood, of course, that the interest found, if any, cannot be returned as interest, because it is not in-

Same.

terest, the action is one to recover damages, and the item of interest, at the legal worth of money from the time the property was destroyed, may, in the discretion of the jury, be added to the value of the property destroyed in ascertaining and returning an amount sufficient to compensate the plaintiff for the injury sustained. The cases of Railroad Co. v. Young, 81 Ga. 397, 7 S. E. 912, and Ratteree v. Chapman, 79 Ga. 574, 4 S. E. 684, are not in conflict with this ruling. In the former case it was ruled that interest cannot be added by the jury, in their discretion, to discretionary damages awarded by them for a personal injury, and, in the latter case, that it may not be added where punitive damages can be allowed. These cases stand for themselves unaffected by the ruling in this, which goes only to the extent that under our law the jury may, in the lawful exercise of their power, add to the value of property destroyed a sum equal to the interest on such value; not that they must, but may, in the exercise of their judgment and discretion. Such, in effect, we understand to have been the charge of the court.

2. The jury evidently misunderstood the charge of the court in respect to the allowance of interest in their finding. The verdict which they returned was irregular, but it evidenced their intention to add interest to the value of the property sued for. Speaking for myself, I think juries should correct their own verdicts in all cases where anything more than form is involved, and the better practice would have been to have declined to have re-

Same—Liability—
Question for Jury.

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ceived the verdict as written, instructed the jury fully as to their discretion in adding the legal interest to the value found, and let them have shaped their verdict with this better understanding, so as to include or exclude the interest, as they might, on further consideration, determine. But my brethren are of the opinion that this correction of the verdict by the court simply put the finding in a legal shape, and gave proper expression to the conclusions which the jury had reached. And as in *Collins v. Bullard*, 57 Ga. 333, this court held that a verdict may be amended by the court in separating principal from interest, it may not be illogical to rule that the addition of interest to the sum found as damages may be allowed by the court, when the jury have by their verdict expressed a finding of interest.

3. Before the argument of the case began, counsel for defendant admitted the killing of the animal to recover which the suit was brought, and asked for the opening and conclusion, which was denied. We think the denial was right. The effect of the admission did not go far enough to shift the burden. To entitle the plaintiff to recover, he must have shown two things: The killing being shown, the law would presume negligence, but it would not have presumed a value, as we understand it. The burden is not shifted until the admissions show a *prima facie* right to recover, to rebut which the defendant undertakes. So long as any portion of the burden of making out his case by proofs rests on the plaintiff, he is entitled to open and conclude, unless the defendant introduces no evidence. The admissions here went only half way the road the plaintiff had to travel before he could reach a stopping place. The other half proved to be a stony path for him; but he finally passed over it, and established that he had done so to the satisfaction of the jury, and, there being evidence to sustain the verdict of the jury, we will not interfere with their finding. Judgment affirmed. All the justices concurring.

Same—Arguments
of Counsel.

NOTES.

(1) **When Recoverable.**—Interest is recoverable as part of the damages in an action against a railroad for killing cattle. *St. Louis, I. M. & S. R. Co. v. Biggs*, 50 Ark. 169, 6 S. W. Rep. 724.

Where cattle are killed through a failure of the company to maintain proper cattle-guards, it is liable for their value with interest. *Lackin v. Delaware & H. C. Co.*, 22 Hun. (N. Y.) 309.

Interest on the value of stock lost or destroyed through the negligence of a railway company may be included in damages. *Varco v. Chicago, M. & St. P. R. Co.*, 11 Am. & Eng. R. Cas. 419, 30 Minn. 18, 13 N. W. Rep. 921.

In an action for the value of a horse killed by a railroad, interest may be recovered on the value of the animal from the *time of the accident*. *Baltimore & O. R. Co. v. Schultz*, 22 Am. & Eng. R. Cas. 579, 23 Am. & Eng. R. Cas. 211, 43 Ohio St. 270, 54 Am. Rep. 805, 1 N. E. Rep. 324.

In an action for killing stock, an instruction to the jury that if they found in favor of plaintiff they should return a verdict for the value of the stock which they might ascertain, with interest from the *date of the loss* to the time of the trial, correctly states the law. *Alabama G. S. R. Co. v. McAlpine*, 22 Am. & Eng. R. Cas. 602, 75 Ala. 113.

Where a horse is killed by the negligent operation of a railroad, the measure of damages is his value when killed, with interest to the *time of recovery*. *St. Louis, I. M. & S. R. Co. v. Biggs*, 50 Ark. 169, 6 S. W. Rep. 724.

Where plaintiff recovers from a railroad company the value of a horse killed by the train he is entitled to interest from the *time the suit was instituted*. *Woodland v. Union Pac. R. Co.*, (Utah) 26 Pac. Rep. 298.

An instruction that if the plaintiff's cow escaped from the plaintiff's field through a defect in the fence which it was the duty of the defendant to erect and maintain, and such defect was an open, visible one, existing for some time before the killing of the cow, the plaintiff was entitled to recover for the killing; and interest on the value of the animal was proper. *Jebb v. Chicago & G. T. R. Co.*, 31 Am. & Eng. R. Cas. 532, 67 Mich. 160, 10 West. Rep. 905, 34 N. W. Rep. 538.

(2) **When Not Recoverable.**—In fixing the amount of damages under a suit for killing live stock, interest is not recoverable *eo nomine*, but the jury may consider the length of time damages have been withheld, the character of the tort, the conduct of the defendant, and all the circumstances of the transaction, and may, in their discretion, increase the amount of the damages allowed accordingly. *Western & A. R. Co. v. McCauley*, 68 Ga. 818.

The owner of stock killed by a railway for want of a fence is not entitled to interest on its value from the time of killing. *Toledo, P. & W. R. Co. v. Johnston*, 74 Ill. 83.

Plaintiff is not entitled to the interest on his damages prior to the finding of the verdict, and it was error to instruct the jury that they might include interest at six per cent. *Brentner v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 448, 68 Iowa 530, 23 N. W. Rep. 245, 27 N. W. Rep. 605.

In the absence of any statutory provision in Kansas allowing interest in actions against railroads for stock killed it is not recov-

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erable. *Atchison, T. & S. F. R. Co. v. Gabbert*, 22 Am. & Eng. R. Cas. 621, 34 Kan. 132, 8 Pac. Rep. 218.

Under the Kansas railroad stock law of 1874, in an action for the value of an animal killed by the company in the operation of its railroad—*held*, that the plaintiff can recover only what the statute permits him to recover, and cannot recover interest on the value of the animal killed prior to the day of trial. *Atchison, T. & S. F. R. Co. v. Gabbert*, 22 Am. & Eng. R. Cas. 621, 34 Kan. 132, 8 Pac. Rep. 218.

In an action against a company for negligently killing stock, interest is not allowable for the time between the date of the killing and that of the recovery. *Meyer v. Atlantic & P. R. Co.*, 64 Mo. 542, 17 Am. Ry. Rep. 249.

ALABAMA M. R. Co.

v.

SOUTHERN RY. Co.

(*Supreme Court of Alabama, June 28, 1897.*)

Use of Tracks by Another Company—Right to Enjoin—Sufficiency of Complaint.*—In a bill by a railroad company to enjoin another railroad company, it was averred that defendant was using a side-track constructed on complainant's land by another company, without its consent, but did not show that the company which had constructed such track had not acquired full title thereto; and defendant's answer alleged that such track had been constructed under authority of a city ordinance, and that defendant had acquired it by purchase, setting out the circumstances. *Held*, that the averment of the bill was sufficiently denied.

Bill and Answer—Dissolution of Temporary Injunction.—Where such bill merely alleges that complainant is informed and believes that defendant designs to cross complainant's tracks without lawful authority, and such intention is denied in the answer, it was not error to dissolve the temporary injunction.

APPEAL by complainant from city court of Anniston.
Affirmed.

Thos. G. Jones, for appellant.

Pettus & Pettus, for appellee.

BRICKELL, C. J. The Alabama Mineral Railroad

*See *Colonial City Traction Co. v. Kingston City R. Co.* (N. Y.), 9 Am. & Eng. R. Cas., N. S., 506, and *foot-note*.

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Company, a corporation owning and operating, as a common carrier, a line of railroad from Calera to Attalla, passing through the city of Anniston, in this state, filed its original bill of complaint in this cause against the Southern Railway Company, a corporation owning and operating, as a common carrier, a line of railroad the terminal points of which are not stated, but which also enters into and passes through the city of Anniston, praying an injunction restraining the defendant company (1) from crossing or attempting to cross the complainant company's railroad tracks located in that city, or from making or attempting to make connections therewith; and (2) from using a side-track belonging to the complainant, or from any manner interfering with or obstructing the free use of the same. The injunction having been issued as prayed, the defendant appeared and filed an answer, verified by the affidavit of one of its agents, and thereupon moved to dissolve the injunction for want of equity in the bill and upon the denials in its answer. Upon the hearing of this motion, the chancellor entered an interlocutory decree dissolving the injunction, and from that decree the appeal is taken.

Case Stated.

The only averment of the bill to which the portion of the prayer asking an injunction against the using of the side-track of complainant can be referred, or upon which it can be based, is contained in the concluding clause of the third section of the bill. That section, after stating briefly the location of defendant's tracks in Anniston to a designated point, thus proceeds: "From which point said Southern Railway Company is operating a track which was constructed on the property of your orator by the receivers of the old East Tennessee, Virginia & Georgia Railway, without the consent or permission of your orator." Neither the circumstances under which, nor the time when, the receivers constructed this track are stated. They may have had an absolute right to have constructed the track, acquired by judicial proceedings or

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by lapse of time, or the circumstances attending the construction of the track may have been such as to now preclude the complainant from injunctive relief. Nor is the court informed by the bill in what manner the defendant acquired possession from the receivers. The sole averment is that the defendant is operating the track without the consent or permission of complainant. The defendant, in its answer to this section of the bill, not only denies that this track was constructed on the property of the complainant, but proceeds to give the time and circumstances under which it was constructed by the receivers, and the manner in which possession was acquired by defendant; all of which must be taken as responsive to the averment of the bill. The language of the answer in this regard, after stating that the track was in a street of Anniston, is: "This defendant denies that said track is constructed on the property of the complainant, but, on the contrary, this defendant avers that said track was constructed in the month of April, 1893, by the receivers of the East Tennessee, Virginia & Georgia Railway Company, under and by virtue of an ordinance passed by the mayor and city council of the city of Anniston; that this defendant, at a sale of the property and franchises of said East Tennessee, Virginia & Georgia Railway Company, became the purchaser of all the property, rights, and franchises of the said East Tennessee, Virginia & Georgia Railway Company, and has been in the constant use and enjoyment of said track ever since that time; that from the month of April, 1893, up to the time of the issuance of the injunction in this case, on the 21st day of December, 1895, the receivers of the said East Tennessee, Virginia & Georgia Railway Company, and, succeeding them, this respondent, have been in the constant possession, use, occupation, and enjoyment of said track; that complainant was fully informed of the building of said track at the time it was built, and made no protest or objection to the building of said track, and this respondent, and the receivers of the East Tennessee,

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Virginia & Georgia Railway Company, have been continuously and notoriously in the possession, use, and occupation of said track from the time it was so constructed, in the month of April, 1893, down to and including the 21st day of December, 1895; that complainant allowed the said receivers of the East Tennessee, Virginia & Georgia Railway Company to enter upon the said land, and to build and construct said track at great expense, to wit, at the expense of twenty-three thousand dollars, and has never, at any time up to the filing of the bill of complaint in this case, attempted in any way, by any legal proceedings, to restrain the said receivers or this respondent from the quiet use and enjoyment of said track." This, in our opinion, is an unequivocal denial of the allegations of the bill, requiring the dissolution of the injunction as to the occupancy of this track.

Turning to the other branch of the injunction, the averments of the bill, as contained in section 4, are, in substance, that on or about the 20th day of December, 1895, the defendant, by and through its servants, agents, and employees, attempted to lay switches or connections from its said track to the track of complainant at a designated point; and that, upon information and belief, the defendant intended to connect its tracks with, or to cross the tracks of complainant with, one of its tracks at the same or some other designated point, it is not clear which. In the sixth section of the bill it is averred, in substance, that the defendant had never obtained the consent of complainant to make any connections or crossings with the said tracks at any point, nor had it any contract or agreement for any such connections or crossings between its said tracks; that no legal proceedings had been instituted looking to the acquisition of the right to make any connections or crossings of complainant's tracks with the tracks of the defendant; and that, upon information and belief, the defendant was preparing to connect its tracks with the tracks of complainant, or to cross the same with its

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track, and such connections or crossings would injure the property of complainant, and increase the danger of operating its trains through the city of Anniston, and defendant would make the connections or crossings unless restrained by the process of the court. What constitutes the attempt charged, or what defendant has done to consummate such attempt, or the nature and extent of the preparation made, are not shown.

The defendant, answering the fourth section of the bill, the substance of which is given above, denies each and every allegation therein contained, and then proceeds: "On the contrary, respondent avers that, before the 20th day of December, 1895, the complainant entered upon the track of this respondent, and, by force and arms, tore up and threw into ditches the materials used in the construction of a switch which connected the track of the respondent with a track owned by the Woodstock Iron Company, and the only thing which has been done by this respondent, or by any of its servants, agents, or employees, with reference to said track, was to take out of the ditches the materials so thrown therein, and to lay them, without in any way attaching them to the ground, and without the use of any new material of any sort or description whatsoever, where they were laid before they were torn up by said complainant, and, after they were laid upon the ground, the said complainant again, by force and arms, took up the said material and again threw it into said ditches, and, by force and arms, tore up the said track of said Woodstock Iron Company, and appropriated a part of the material, iron, rails, and cross-ties in the construction of another track. That the said switch so constructed by the respondent was constructed by and with the consent of the Woodstock Iron Company, and connected with the track of the said Woodstock Iron Company, and not with the track belonging to the complainant. This respondent has never crossed, or attempted to cross, at any of the points mentioned in said bill, any tracks belonging to the complainant. That respondent is advised by coun-

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sel, and upon such advice states, that it has a right, under the constitution and laws of the state of Alabama, to cross the tracks of the complainant at such point or points as may be necessary to the useful and convenient use and operation of its railroad in and about the city of Anniston, upon making just compensation therefor, and that respondent has never attempted to make any such crossing in any manner contrary to the laws of the state of Alabama, and has no intention of so making any such crossing." In the sixth section of the answer the respondent says: "It has never attempted to make any crossing or connection with the track of complainant at any of the points mentioned in said bill of complaint. * * * Respondent denies that it is preparing to connect its track with the track of the complainant, or to cross the same with its track, unless such connection or crossing is made with strict conformity with the constitution and laws of the state of Alabama in such case made and provided. This respondent denies that any crossing or connections so contemplated by this respondent will increase the danger of operating the trains of complainant through the said city of Anniston, because this respondent avers that any such crossing, at the place mentioned in said bill of complaint, is not proposed to be made by this respondent, except in conformity with the laws of the state of Alabama. And this respondent denies that any order of this court is necessary to restrain this respondent from making any crossing or connection with any of the tracks of the complainant."

We have quoted fully from the answer, in order that the several denials therein contained may appear in connection with the context, without intending to be understood as holding that all the averments quoted are responsive, and can, therefore, be considered upon this appeal. Eliminating that which is not responsive, and it is sufficiently clear, in our opinion, that the answer denies the material allegations of the bill in respect to the defendant crossing or connecting with the tracks of the complainant, to warrant a dissolution

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of the injunction. If it is the purpose of the defendant to institute proceedings to condemn, this purpose is lawful, and should not be thwarted by injunction. In such case, if it be, as contended for on behalf of complainant, that the defendant has no right to condemn, this contention will be available to it in the proceedings instituted for that purpose. If, on the other hand, its purpose should be to unlawfully proceed to cross or connect with the tracks of complainant, and, during the pendency of this suit, it should proceed to carry into effect such purpose, on proper motion of complainant, the chancellor has the power to reinstate the injunction. Affirmed.

BOND

v.

PENNSYLVANIA CO.

(Supreme Court of Illinois, Feb. 14, 1898.)

Use of Streets by Railroads—Abutting Owners—Demurrers.—One cannot answer and demur at the same time to the same matter.

Same—Right to Enjoin.*—The construction and operation of a steam railroad in a city street creates an additional servitude upon it; and an abutting owner, prior to its condemnation by the railroad company, may enjoin the creation of such servitude, though the privilege of so using the street had been granted the company by the city.

Estoppel.—The fact that both plaintiff and defendant own lands abutting on such street by titles derived through mesne conveyances from the same source does not estop defendant from occupying such street for railroad purposes, such fact not establishing contractual relations between plaintiff and defendant.

APPEAL by plaintiff from First district appellate court. *Reversed.*

Ritchie, Esher & Woolley, for appellant.
Loesch Bros. & Howell, for appellee.

*See note at end of case.

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CARTER, J. This was a bill for an injunction, filed by appellant in the circuit court of Cook county, October 28, 1889, against the appellee and others, to restrain the laying of additional railroad tracks in Stewart avenue, a public street in the city of Chicago, and the erection of a fence along the east line of the west 66 feet of and in Stewart avenue, along and past the abutting property of appellant, in accordance with an ordinance of the city of Chicago passed July 21, 1887, granting to the Pittsburgh, Ft. Wayne & Chicago Railway Company, its lessees and successors (here represented by appellee), the right to lay down and operate two additional tracks in such portion of Stewart avenue. The bill was afterwards dismissed as to all defendants except appellee. It was answered by appellee on December 18, 1889; and this answer, after a demurrer was overruled, was, on motion of appellee, ordered to stand as an answer to the bill as amended July 14, 1893. The cause was referred to a master, and, after some proof had been taken, the amended bill was again amended, August 27, 1895, to which bill as secondly amended appellee demurred. The demurrer was sustained, and the bill dismissed for want of equity, December 15, 1896. The appellate court has affirmed the decree, and appellant has appealed to this court.

Case Stated.

The first point made on this record is that, after appellee had answered the original bill, it could not demur to the amended bill upon any ground alleged previous to its answer. The reasons set forth in the last demurrer are that appellant had not, in or by his amended bill, made or stated a case which ought to entitle him to any relief. Inasmuch as appellee had answered the original bill, and, after demurring to it as first amended, asked leave to have its answer stand to the bill as amended, it was precluded from demurring to the bill as secondly amended on any ground that had already been answered, for one cannot answer and demur to the same matter at the same time; and after having

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answered the original bill, if the same is amended, the defendant cannot put in a general demurrer to the whole bill, because the answer will overrule the demurrer. The right to demur a second time to the whole bill, upon amendment made, applies only to cases where the amendment is made and the demurrer filed before the answer is put in. Appellee should have confined its demurrer to the matter set up in the last amendment. 1 Enc. Pl. & Prac. 491; 6 Enc. Pl. & Prac. 414, 430; 1 Daniell, Ch. Prac. (6th Am. Ed.) 409. The last amendment did not abandon any of the original grounds for relief, but set up an additional ground.

The original bill, as first amended, alleged that appellant was the owner in fee simple of lots 1 and 2 of block 1 in the United States Bank addition to the city of Chicago; that lot 1 fronted on Stewart avenue, and that he was also the owner in fee of the east 66 feet of Stewart avenue, in front of said lot, subject to the public easement for a street; that appellee, without offering to compensate him, and without authority of law, but solely under the pretended authority of an invalid ordinance, was about to lay down and use certain railroad tracks lengthwise upon and over all that portion of Stewart avenue owned by appellant; and that thereby it would take exclusive possession of the same, and destroy the use of such street by the public; and that no steps had ever been taken by appellee to condemn appellant's property rights in such street for such additional right of way, nor to assess his damages. In the last amendment appellant alleged that the appellee owned a number of tracts of land along the line of said Stewart avenue, and that both he and it derived their title to their lands from the same remote grantor by mesne conveyances, being the original platter of the addition and dedicator of the streets after the making and laying out of the said United States Bank addition. In its answer, appellee denied that appellant owned the fee in Stewart avenue, and claimed that it was in the city of Chicago.

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As the court dismissed the bill for want of equity upon the demurrer, and as counsel on both sides have argued the case on the theory that its merits may be determined in that manner, we have thought it best to consider the principal questions as if properly raised by the demurrer to the whole bill as secondly amended. For the purposes, then, of this decision, it must be taken, as alleged in the bill, that appellant is the owner of the fee in that part of the street mentioned in the bill, subject to the public easement; and the principal question presented by the record is whether an owner of land abutting upon a public street, who owns the fee in such street subject to the public easement, can enjoin the laying of tracks upon and the use and occupation of such street by a steam-railroad company, to the practical exclusion of the public from so much of such street as is so occupied, where no compensation to such owner has been ascertained or made, but where such company is acting under authority of an ordinance of the municipality. The mere statement of the question would seem to imply its logical answer. It has, however, been decided by this court in many cases that the construction and operation of a street railway in a public street impose no new servitude upon the land, but that such a use of the street is but another mode of using it for public travel, and is entirely consistent with the objects and purposes for which streets are opened and used by the public. See *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255, 40 N. E. 1008, and cases cited, where it was said that the weight of authority is in favor of the position that a street railway is not an additional servitude, even where the fee of the street is in the abutting owner, but that the rule is otherwise as to steam railroads. It has also been held that where authority has been given by law to a steam-railroad company to lay tracks, run trains thereon, and to operate its road in a public street, the fee of which is in the municipality, the owner of abutting property cannot enjoin such use and occupation of the street, but is remitted to his

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action at law to recover any damages which he may sustain by reason of such occupation and use of such street; and the reasons given are that there is no taking and appropriation of his property, nor direct injury to it; that his damages are consequential, if any are suffered; and that it cannot be known in advance that he will be damaged at all; and that the railroad company cannot be required to proceed to condemn and pay damages to all who may be incidentally injured in their property rights, before it can construct its road upon a right of way to which such abutting owners have no title. *Stetson v. Railroad Co.*, 75 Ill. 74; *Truesdale v. Sugar Co.*, 101 Ill. 561; *Railroad Co. v. Schertz*, 84 Ill. 135; *City of Olney v. Wharf*, 115 Ill. 519, 5 N. E. 366; *Insurance Co. v. Heiss*, 141 Ill. 35, 31 N. E. 138; *Railroad Co. v. McGinnis*, 79 Ill. 269. But the

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rule has not been extended to cases where a steam-railroad company is about to take and appropriate to its own use a street, or part of it, by laying its tracks, and operating its trains upon it, the fee of which street belongs to the owner of the abutting property. In such a case it is held that the occupation and use by the company of the street creates an additional servitude upon it, it not being one of the ordinary uses to which a public street may be devoted in facilitating public travel, or within the purposes of its dedication. And it was held in *Railroad Co. v. Hartley*, 67 Ill. 439, that the owner of abutting property, who also owns the fee of the street, may maintain trespass against the company for laying its tracks upon and using the street for its purposes as right of way, although authorized to do so by ordinance passed under power conferred by the legislature. See, also, *Telegraph Co. v. Barnett*, 107 Ill. 507, and *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, *supra*. In *Elmore v. Commissioners*, 135 Ill. 269, 25 N. E. 1010, citing the *Hartley* and *Barnett* Cases, it was said (page 278, 135 Ill., and page 1012, 25 N. E.), in a case brought by a landowner for damages: "If, however, by the enlargement of the district, an additional burden of

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water was precipitated upon his lands, to his detriment, it would seem that, prior to the discharge of such additional water upon the lands, the damages consequent upon such enlargement should have been assessed by a jury, and paid by the district." True, it was said in *Insurance Co. v. Heiss*, on page 58, 141 Ill., and page 142, 31 N. E., that "this court is probably committed to the doctrine that injunction will not lie at the suit of the abutting property owner when the entry upon and occupation of the street by a railroad is by the authority of the municipal agency invested with the control of such street"; but in that case the fee of the street was in the city, and there had been no physical invasion of the property, and the cases hereinbefore cited were referred to as sustaining the view there expressed; but we have been referred to no case decided by this court where it was held that an injunction would not lie in such a case in favor of the owner of the abutting property where the fee of the street is in him. It was said in the *Hartley Case* (page 444) that "a distinction has been taken where the municipality granting the right to lay the track owns the fee in the streets and where the fee remains in the abutting landowner; and it seems to us that it rests on sound principle, and is supported by the highest authority." Neither the state nor the municipality has the power to grant away the private property of the citizen, and, if corporations *quasi* public seek to appropriate it to their exclusive use, every principle of justice demands that they should make just compensation, whether the property taken is of little or great value. *Telegraph Co. v. Barnett*, *supra*.

Appellant alleges in his bill that the laying of the additional tracks in Stewart avenue, and the erection of a fence to the east of such tracks, will be an exclusive use of such street by the railroad company, and it would not seem there could be much doubt that such would be the case to the extent the tracks occupy the street; but whether or not the street as widened could be safely and conveniently used for all methods of

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travel is a question not necessary to consider here ; nor is it necessary to consider whether a case for injunction might not be presented where the abutter does not own the fee of the street, but the occupation and appropriation of the street by the company is such as to exclude all other modes of travel, and destroy the abutter's right of ingress and egress. *Ligare v. City of Chicago*, 139 Ill. 46, 28 N. E. 934. In the case at bar there is a threatened appropriation of appellant's property by appellee without compensation. Why has not equity the power to enjoin such appropriation? In *Corcoran v. Railroad Co.* 149 Ill. 291, 37 N. E. 68, appellant contended that by reason of the vacation, as he claimed, of a certain street, the fee in the same reverted to him, and sought to enjoin the railroad company from laying its tracks thereon without first condemning the land, and making compensation therefor ; but it was said that the ordinance was void, and further (page 295, 149 Ill., and page 68, 37 N. E.): "Whether, if said ordinances were effectual as vacating a part of the street, the land would revert to the original proprietor, and appellant have such an interest therein, under his lease, as should be first compensated for under the law of eminent domain, it is not necessary here to be determined. If such was the case, it might well be that a court of equity would entertain jurisdiction to prevent the threatened invasion of his rights." In *Cobb v. Railroad Co.*, 68 Ill. 233, it was held that complainant was entitled to an injunction restraining the defendant company from entering upon his land, and laying a track thereon, and removing his soil ; and it was said that an injunction would be granted to prevent a railway company from exceeding the powers granted in its charter. In *Hall v. People*, 57 Ill. 307, this court said (p. 316): "No man can be compelled to part with his property without just compensation. This is a constitutional right that he cannot be deprived of by any statute. No corporation, public or private, can appropriate the property of any one to their own use without first tendering or paying the damages

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assessed under the forms of the law. The party ought not to be driven to his action against a corporation, responsible or irresponsible, for his damages. This would be to take his property without first making compensation, and would be a plain violation of a constitutional right." In *Commissioners v. Durham*, 43 Ill. 86, it was held that it was proper to enjoin the attempted opening of a road before the damages to a landowner had been adjusted. Mr. Lewis, in his work on Eminent Domain (section 631), says that "it is now almost universally held that an entry upon private property under color of the eminent domain power will be enjoined until the right to make such entry has been perfected by a full compliance with the constitution and the laws."

The railroad, and use of it by appellee, being an additional servitude upon the land used as a public street, the fee of which was in appellant, appellee must first proceed to condemn appellant's interest in the street for its own uses before it can lawfully appropriate it. This view is supported by sound reason and by abundant authority. 6 *Thomp. Corp.* §§ 7772, 7773; *Williams v. Railroad Co.*, 16 N. Y. 97; *Henderson v. Railroad Co.*, 78 N. Y. 423; *Cox v. Railroad Co.*, 48 Ind. 178; *Ford v. Railway Co.*, 14 Wis. 609. Both parties refer to and comment upon *Doane v. Railroad Co.*, 165 Ill. 510, 46 N. E. 520, and other cases of similar character; but in that case it was pointed out that there was no distinction between surface and elevated street railways, and the roads there in question were regarded as street railways, constructed and operated for the public convenience in facilitating travel along such streets.

By the last amendment of his bill, appellant alleges that appellee is the owner of lands abutting on this street by title derived through mesne conveyances from the same source from which appellant derived his title,—that is, from the maker of the plat, by and upon which plat this street is laid off and platted; and the contention is made that, as both

Estoppel.

Note

parties and their grantors bought their said respective lots with reference to this street, a contractual relation has been established between appellant and appellee, from which an equitable estoppel arises against appellee in favor of appellant, which deprives the former of any power or right which it might otherwise have to lay said tracks in said street or to obstruct the same. We cannot agree to this view. It does not appear that appellee denies the existence of the street or the legal effect of the plat, but, admitting that the street was properly dedicated and exists as a public street, claims the right to construct and operate its road therein under authority of legislative acts of the city council and the legislature. The estoppel contended for would operate to prevent appellee from constructing its road simply because it was an abutting owner, but would not extend to companies not owning abutting property. We think no such distinction can be drawn. Appellant cites the following cases: *Earll v. City of Chicago*, 136 Ill. 277, 26 N. E. 370; *Mason v. City of Chicago*, 163 Ill. 351, 45 N. E. 567; *Marsh v. Village of Fairbury*, 163 Ill. 401, 45 N. E. 236; *Maywood Co. v. Village of Maywood*, 118 Ill. 61, 6 N. E. 866; *Zearing v. Raber*, 74 Ill. 409; *Field v. Barling*, 149 Ill. 556, 37 N. E. 850; but they do not sustain the view contended for. Independently, however, of this branch of the bill, as before pointed out, the bill stated a good cause of action, and the trial court erred in dismissing it for want of equity. The judgment of the appellate court affirming the decree, and the decree of the circuit court, will therefore be reversed, and the cause is remanded to the circuit court, with directions to overrule the demurrer and to proceed with the cause. Reversed and remanded.

NOTE.

Railroads in Streets—Right of Abutting Owner to Enjoin.—Injunction restraining the construction and operation of a railroad, until damages resulting therefrom have been paid or secured, is a proper remedy where the abutting property holder owns the fee in the street. *Washington Cemetery v. Prospect Park & C. I. R. Co.*, 68 N. Y. 591, *affirming* 7 Hun 655, s. c., 4 Abb. N. C. 15; *Harrington*

Note

et al. v. St. Paul & Sioux City R. Co., 17 Minn. 215, *following* *Craig v. Rochester City & B. R. Co.*, 39 N. Y. 404.

But this remedy has been denied where the injury was small and there was ample redress at law. *Borraem v. North Hudson County R. Co.*, 40 N. J. Eq. 577; *Fulton v. Short Route Ry. Transfer Co.*, 85 Ky. 640.

In general, the remedy of the abutting owner lies in an action for damages, and equity will not interpose to enjoin the occupation of a street except in extraordinary cases. *Truesdale v. Peoria Grape Sugar Co.*, 101 Ill. 561, 5 Am. & Eng. R. Cas. 248; *Mills v. Parlin*, 106 Ill. 60, 14 Am. & Eng. R. Cas. 147; *Stetson v. Chicago, etc., R. Co.*, 75 Ill. 74; *Osborne v. Missouri Pac. R. Co.*, 37 Fed. Rep. 830; *Heath v. Des Moines, etc., R. Co.*, 61 Iowa 11, 10 Am. & Eng. R. Cas., 313; *Norfolk, etc., R. Co., v. Smoot*, 81 Va. 504; *Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co.*, 11 Leigh (Va.), 43.

Where the injunction is allowed the court will usually dissolve it upon the company's executing a proper bond conditioned to pay all damages awarded against it. *Fouche v. Rome St. R. Co.*, 84 Ga. 233; *McMahon v. St. Louis, etc., R. Co.*, 41 La. Ann. 827. See also *Kavanagh v. Mobile, etc., R. Co.*, 78 Ga. 271, 32 Am. & Eng. R. Cas. 267; *Patterson v. Chicago, etc., R. Co.*, 75 Ill. 588; *Cairo, etc., R. Co. v. People*, 92 Ill. 170; *Georgia Southern, etc., R. Co. v. Ray*, 84 Ga. 376, 43 Am. & Eng. R. Cas. 95 (injunction granted until performance of condition requiring compensation); *Ross v. Georgia, etc., R. Co.*, 33 S. Car. 477, 46 Am. & Eng. R. Cas. 34. In Iowa, the abutting owner may always enjoin the company unless it has paid the compensation provided by statute, and this right to enjoin is not merged in an unpaid judgment for damages against the company. *Harbach v. Des Moines, etc., R. Co.*, 80 Iowa 593, 43 Am. & Eng. R. Cas. 115.

In *Arbenz v. Wheeling, etc., R. Co.*, 33 W. Va. 1, 40 Am. & Eng. R. Cas. 284, it was held that the abutting owner was not entitled to an injunction unless the value of his property was entirely destroyed.

In *Georgia, etc., R. Co. v. Ray*, 84 Ga. 376, 43 Am. & Eng. R. Cas. 95, it was held that the abutting owner might enjoin the construction of the railroad for non-payment of compensation, although the statute provided that he might institute proceedings for the assessment of damages.

The construction of a railroad track in a street was held not to cause special injury to owners of abutting property, and therefore insufficient to sustain a suit for injunction. *Fogg v. Nevada, etc., R. Co.*, 20 Nev. 429, 43 Am. & Eng. R. Cas. 105.

See also *Varwig v. Cleveland, C. C. & St. L. R. Co.*, 4 Am. & Eng. R. Cas., N. S., 266.

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MOBILE & M. RY. CO. *et al.*

v.

ALABAMA M. RY. CO.

(Supreme Court of Alabama, July 29, 1897.)

Railroad in Street—Injunction by Abutting Owners.*—The object of a bill by abutting owners was to have a railroad company enjoined from continuing its occupancy of a public street under a license from the city, which the chief complainant, also a railroad company, could not occupy without first obtaining such license. It alleged that such occupancy was without the consent of complainants, and greatly to their damage, for which they had been offered no compensation. *Held*, that the bill was not without equity and should not have been dismissed, but a perpetual injunction was properly refused, it not appearing from the bill and answer that the damage to complainants could be large as compared with the loss which would be entailed by the perpetuation of the injunction, not only on defendant, but on another company with which it proposed to connect by means of such street.

APPEAL by complainants from city court of Montgomery. *Reversed.*

Thos. G. Jones, for appellants.

A. A. Wiley and Chas. Wilkinson, for appellee.

HARALSON, J. The principles involved in this litigation have been the subject of repeated consideration and adjudication in this court. We may, for the purposes in hand, so far as is deemed necessary, summarize the result of these decisions,—in harmony with decisions elsewhere, and with the text writers on the subject.

The rights of property in the public streets of a city, as has been held, are of two classes. The one when there has been, by the owner of the land, a simple dedication of a part of the land as a street or public highway, without any conveyance of title, in which

*As to Injunction against the Occupation of a Street by a Railroad, see 4 Am. & Eng. R. Cas., N. S., 271, *note*.

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case, neither the government, the municipality, nor the public acquires any other interest than an easement, the ultimate fee remaining unaffected by the dedication; and the other, where dedication has been made and the fee conveyed by the owner to the municipality. In *Perry v. Railroad Co.*, 55 Ala. 424, referring to these two classes, the court said: "But, in each of these classes of cases, if the sovereign power grant the right to construct a railroad track and run trains on or over such public street, this is a legitimate exercise of the police power inherent in the state, and the changed use of the street ceases to be a public nuisance of which any one can complain. See an able discussion of this subject in *Barney v. City of Keokuk*, 94 U. S. 324. When, however, under the first named of the above classes, the ultimate fee remains in the land proprietor, the municipal government cannot confer on a railroad corporation, the right to convert a public street into a roadbed for its own use, unless the charter of such municipality, or some other legislative authority, confer on it the power to do so." *State v. Mayor of Mobile*, 5 Port. (Ala.) 279.

In the case referred to in 94 U. S., it was held, that there is no substantial difference between these two classes of streets,—in which the legal title is in a private individual, and those in which it is in the public,—as to the rights of the public therein.

Again it was said in *Perry's Case*, *supra*: "When a street [of the first class named] thus dedicated, is improperly obstructed, or perverted to a use other than that for which it was dedicated, the owner of the fee has left in him sufficient title or right to prevent or redress the wrong; and for this purpose, the general rule is, that the owner of the adjoining property is the owner of the ultimate fee, extending to the center of the street. See *Cincinnati v. White*, 6 Pet. 431; *Dill. Mun. Corp.* §§ 493, 495, 496, 500, 524." The complainant in *Perry's Case*, was allowed to maintain the bill, on its averments, for the reason that no express provision was found in the charter of Mobile, author-

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izing the city authorities to grant, as they had done, to the railroad company, the right to lay its track on the streets of the city, a power which could not be exercised, unless conferred either expressly or impliedly by the legislature. 3 Elliott, R. R. §§ 1076-1079.

In *Railway Co. v. Witherow*, 82 Ala. 190, 3 South. 23, the complainant sought to enjoin and restrain the defendant from the further construction of an embankment in one of the streets of the town of Leeds, on the ground that the embankment would be a public nuisance, and would greatly injure and depreciate the value of two town lots owned by complainant, who was an adjacent owner, claiming a right to the center of the street. The bill alleged that the defendant had never paid or offered to pay complainant, any compensation for the damages to her said property by the construction of said road, and there had never been any agreement between them fixing the compensation to be paid her therefor. A motion to dissolve the injunction that had been granted, for want of equity, and on the denials of the answer, was overruled.

This court held, that the bill on its face contained equity. "Taking these facts to be true (as the court said), the authorities are numerous in support of the bill. Unless authorized by some law, in consonance with the provisions of the constitution, such use of the public streets of an incorporated town presumptively would be unauthorized by the original dedication, and would *prima facie* be a special damage to the complainant, which could be restrained by injunction at her instance, she being an adjacent property owner." In that case, the provision of section 7 of article 14 of the constitution, prohibiting the taking of private property by municipal and other corporations, without making just compensation for the property taken, injured or destroyed—such compensation to be paid before such taking, injury or destruction,—was duly considered. This court overruled the decree of the court below, and rendered a decree providing for a dissolution of the injunction upon the defendant furnishing security

deemed adequate for the damage it might do, in the erection of said embankment. The court said: "The proceeding is one in restraint of a public work of great utility—the construction of a railroad—thus presenting a case in which injunctions are granted with great caution. Delay in the construction of the work may operate very oppressively against the defendant, as well as result in great injury to the public. Courts very often, in such cases, balance the question of damages to the one party, and that of benefit to the other, resulting from the maintenance of the injunction, on the one hand, and its dissolution on the other, and refuse to take any action which will cause great injury to one party, and probably be of serious detriment at the same time to the public, without corresponding advantages to the other party." Citing High, Inj. (2d Ed.) § 598; East & West R. Co. v. East Tennessee, V. & G. R. Co., 75 Ala. 275; Torrey v. Railroad Co., 18 N. J. Eq. 293. The court added, that the case did not present the facts in such shape as to require them to act on that rule, thereby intimating, that if the facts had so appeared, there would have been no hesitation in its application, as was done in the 75 Ala. case cited. It is to be observed, that though the facts stated in the bill, gave it equity, as was held, and authorized the relief sought, but were not sufficient for the absolute application of the rule just quoted in respect to the dissolution of injunctions in such cases, yet, out of abundant caution, lest a great railroad enterprise might be delayed in its construction, operating oppressively against the company, as well as in great injury to the public, the court in that case rendered a decree denying the relief as prayed for, and dissolving the injunction on terms of easy compliance by the defendant.

The case of Western Railway of Alabama v. Alabama G. T. R. Co., 96 Ala. 272, 11 South. 483, is another case of the character of the one before us, in which the court, in the exercise of a sound discretion, balancing the relative inconvenience and injury likely

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to result from granting or withholding the writ, dissolved the injunction. The bill, as stated, made *prima facie*, a clear case for injunctive relief. The appellee company had entered upon the land of the other company, without its consent and without making compensation therefor, when, as alleged, it was not necessary for said company to take complainant company's lands, which were necessary, as was averred, for the operation of its own road. It was further averred that irreparable damage to the complainant would result, unless the injunction should be granted. The lower court dissolved the temporary injunction, and this court, after elaborate consideration, affirmed the decree. This was done, on the ground, that it appeared the construction of defendant's railway would not interfere with the tracks of complainant, nor with any track it had the right to construct; that the damage to complainant would be nominal; that the defendant was not shown to be insolvent, and that to stop the work under the circumstances would probably result in grievous disaster to its enterprise, which was of a public nature, without any advantages to accrue to the complainant. The bill, notwithstanding it presented a case where the court might grant the relief, was deemed not to be a proper one for injunction, but one in which the complainant should be left to the assertion of its legal rights in a court of law. Citing *Highland Ave. & B. R. Co. v. Birmingham Union Ry. Co.*, 93 Ala. 505, 9 South. 568; *Schurmeier v. Railroad Co.*, 8 Minn. 113 (Gil. 88); *Zabriskie v. Railroad Co.*, 13 N. J. Eq. 314; *Garnett v. Railroad Co.*, 20 Fla. 889; High, Inj. § 598.

That the remedy at law exists for the recovery of damages in cases where property has been taken without the owner's consent, and without having been duly acquired by condemnation proceedings, has received our consideration and approval in the recent case of *Railroad Co. v. Matthews*, 99 Ala. 24, 10 South. 267, where it was properly held, that the owner might maintain an action at law for the redress of the wrong, notwithstanding the well-recognized equitable remedies therefor.

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In this bill, it is alleged that the Mobile & Montgomery Railway Company is the owner in fee simple of lots 1 and 2 in square 21 and square 22, Hanrick's plot, which lots front and are adjacent to what has long been a street in the city of Montgomery, known as "River Street" in all the maps and ordinances of said city; that the Louisville & Nashville Railroad Company, as the lessee of the first-named company, is now in the possession, and has been in possession of said lots for more than 10 years past, using them as a part of its station and depot grounds in said city; that said street was dedicated to the public as a street by the owner of the original tract, by selling lots bordering on said street, and by laying out the same on the maps as a street, and said dedication was accepted by the city, and for more than 50 years said street has been recognized and maintained as a public street by the corporate authorities thereof; that the title thereto has never been conveyed to or held by the city, and the fee to the center of said street resides in the complainant,—the Mobile & Montgomery Railway Company,—so far as the said street touches the real estate aforesaid, subject to the easement of the public therein as a street; that, adjacent to the above-described property, there has been laid out as a sidewalk and used for such purposes for 50 years, a space of about 10 feet, which space lies between the street and complainant's above-described property; that on the 13th day of January, 1897, the city council of Montgomery, by ordinance, abolished and discontinued River street as a public street in said city,—which ordinance is exhibited as a part of the bill,—by which the city purports to grant to the defendant, the Alabama Midland Railway Company, the right to lay, maintain and operate railroads, switches, turnouts, and to stand cars on said River street, and to change the grade thereof. It is further alleged, on the advice of counsel, while the said city may have had authority to discontinue River street as a public street, thus discharging the city from all further obligation or duty to maintain or keep the same in

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repair as a street, that when said street was abolished, the land which had been occupied as a street, remained subject to the original dedication, so far as the owners of the adjacent property were concerned, as a thoroughfare or means of communication to and from their property, and that the control and use of the same to the center of said street, by operation of law, reverted to the adjacent property owners on either side thereof; that the corporate authorities were without authority to grant rights to any one to occupy said street; that the only right by which any one could use any part of said street for any purpose, without the consent of the owner would be to take the same upon *ad quod damnum* proceedings, and upon first making full compensation for all damages resulting from the taking, injury or destruction of the rights of the adjacent proprietors in and to the discontinued street, as provided by the constitution and laws of Alabama; that the defendant company, on the night of the 20th of January, 1897, by force and arms, without the consent of either of complainants, trespassed upon the said sidewalk above described, adjacent to the said property of complainants, and cut down valuable shade trees thereon, and has laid down a railroad on the entire sidewalk adjacent to complainants' said land, for the purpose of connecting that track with other of its tracks in said city; and it is charged, that defendant intends to change the grade of said River street, to its center, and to use that space and said sidewalk for tracks, and the running of trains thereon, and intends to appropriate all of the space adjacent to complainants' property to the center of the street, and devote it to railroad uses, etc.; and thereby not only damage complainants' property on account of the nearness of said tracks, and the operation of trains thereon and the changing of the grade, but destroy complainants' right of ingress and egress over the street adjacent to complainants' property. It is not averred that the defendant corporation is insolvent.

The ordinance of the city exhibited to the bill, is entitled "An ordinance to grant the use, occupancy and

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enjoyment of certain parts of River and Goldthwait streets in the city of Montgomery, to the Alabama Midland Railway Company, its successors and assigns, in consideration of the grant and dedication by the Alabama Midland Railway Company of a street sixty feet wide, extending from Clay street to Martha street through the lands of the Alabama Midland Railway Company," etc.

The preamble to the ordinance sets out the agreement of said company to lay out and dedicate said 60-foot street to the city, in consideration of which the city was "to relinquish to the Alabama Midland Railway Company the use, control and occupancy of certain parts of certain streets,"—including River street,—the declared purpose of which was "to enable the said Alabama Midland Railway Company to have better terminal and transportation facilities in said city of Montgomery, and for the good and convenience of the general public." In consideration of the premises, the ordinance declares, "that all that part of River street now extending west of Moulton street * * * shall forthwith, upon the adoption of this ordinance, be discontinued and abolished" as a public street; that said railway company "its successors and assigns, may reduce the grade of said abandoned streets to any extent that it may deem best; may lay down, maintain and operate railway tracks thereon, with necessary switches and turnouts, and stand cars upon the same," etc.

The defendant demurred to and answered the bill. It admits in its answer the ownership as alleged of said property, and the existence of River street for over 20 years past. It also "admits existence of River street for over twenty years, and user of same for street purposes; but denies that title thereto was never conveyed to the city of Montgomery; does not admit that complainants, or either of them, have any such right, title, claim, or interest therein or thereto, as would entitle them, or either of them, to one-half of said street, even if the same should ever be abandoned by said city, as

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a street, in any manner whatsoever; admits the existence of the sidewalk for a number of years, as stated, but avers that it was seldom used and has long since ceased to be used as a sidewalk; that no one lives on said River street; and that there is no office, workshop, or other building on the north side of said street; that defendant laid its track in such manner as to avoid obstructing River street; that the land of complainants abutting said street, is so far below the surface of said street as to be dangerous to the traveling public, if left unprotected and unbarricaded on said north side; that complainants have removed the house, formerly used as their railway offices, and cut down the ground, so that if defendant should not grade or otherwise improve that portion of said street, great injury would probably result to the public; and defendant avers that by laying its said track along the abandoned sidewalk, on the north side of said street and near to said cut, it is protecting the general public by providing something like a barricade against falling over said embankment down into said cut; that the greater portion of said River street is from twenty to forty feet higher than the level on which complainants' railroad tracks, extending along the ground abutting said street, are situated; that defendant also avers that it owns all the land on the south side of said street, and has its offices there; and has used said street in large measure in reaching said offices, and other property belonging to defendant, and continues to so use the same; but complainants do not use said street for any purpose; that complainants are now excavating near the north side of River street in such manner that it would require a ladder to climb from complainants' tracks in order to reach River street; that said part of River street leads or runs west toward the railroad cut under Bell Street Bridge, but terminates at Whitman street; that ample and abundant space is left on said street for general travel and for the entrance and exit of every one desiring to walk, ride, drive, or in any manner to travel thereon; and defendant avers that it is impossible for complainants to use any part of said

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street in connection with their lands unless they cut down the street from twenty to forty feet, as aforesaid. A map of said street is attached and marked 'Exhibit Y,' and prayed to be taken as part of this answer. And defendant avers that defendant has not cut down the grade, or in any manner interfered with the free use of River street."

"For answer further defendant says that the true intent and meaning of said ordinance is, that the city council, recognizing the great importance of the contemplated improvement, increased facilities for trade and travel, the commercial aid to the city, as well as the interests of defendant, and also in consideration of the dedication of valuable realty as a public street known as 'Clisby Avenue,' and for other valuable considerations by defendant, did grant unto defendant the right to lay its track, and run its cars on and over River street, and to improve the same for the purpose above stated; and this was done in strict compliance with said grant to defendant by the said city council of Montgomery, by means of an ordinance adopted in compliance with legislative authority, granted unto said city of Montgomery, and the said city council, as will more fully appear from section 7, page 14, of charter of Montgomery, as contained in the city Code of Montgomery, to wit:

" 'A.' Section 7. 'To establish, open, alter, widen, extend, grade, cut down, fill in, pave or alter, or improve any street, avenue, sidewalk, public park, grounds,' etc.

" 'B.' Section 15, p. 19, 'power to authorize the use of streets of said city [by] horse, steam, or electric railroad and to regulate the same;' and by virtue of the authority therein conferred defendant did erect a single track on said portion of said street and run its cars thereon, until complainants obtained a writ of injunction from this honorable court restraining the use and operation thereof."

The charter, in its sixteenth section, further confers

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on the city the power "generally to control and regulate the use of the streets for any and all purposes."

The answer further sets up, that in so far as the city authorized the use of said street by defendant, the license was under legislative authority duly and wisely exercised; "that defendant is not occupying one inch of ground ever occupied by complainants, or either of them; that defendant is not occupying one inch of ground that could be occupied by complainants, or either of them, if defendant immediately removed its track, or in any wise or manner renounced or relinquished any right or privilege to use said street," which it acquired under said ordinance. It is further shown that the Mobile & Ohio Railroad Company, operating 685 miles of road, is now building a road from Columbus, Miss., to Montgomery, Ala., involving an expenditure of many millions of dollars, which railroad company will reach the city of Montgomery over the terminals of the defendant company, provided for in said ordinance.

It seems to be well settled, that the legislature has the power, generally, to vacate a street in a city, and may delegate this power to the municipal authorities. Elliott, Roads & S. 661, 663, and authorities cited. Whatever may be said of said city ordinance, as to whether it exceeded in part the powers conferred on it by the legislature or not, we apprehend it was, so far as appears, a valid license by the city, and to that extent within its grant of powers, for the defendant to occupy the portion of said street on which it is alleged it laid its track. *Peters v. Railroad Co.*, 56 Ala. 537; *Perry v. Railroad Co.*, *supra*. All such licenses, however, must be granted, subject to the rights of abutting proprietors, under the constitution and laws of the state, who may have acquired rights by the terms of the dedication under which the street was set apart, and may sustain special injury thereby. *Town of Avondale v. McFarland*, 101 Ala. 381, 13 South. 504.

From all this it appears that the complainants are seeking in this suit, to prevent the defendant from

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doing what they, themselves, could not do, except under a license from the city, to which they would be no more entitled than defendant. The sidewalk on which defendant's road is placed, is high up on a bluff away from complainants' lines and business, incapable of use by them, so far as appears, unless dug away to the level of their lines below, which would more effectually destroy said sidewalk, than its occupancy by defendant tends to destroy or injure it. Nor could complainants occupy any portion of said street to its center, without impairing public conveniences as much or more than defendant's occupancy does. That the running of a line along said street for terminal facilities and connections by the defendant company and the Mobile & Ohio Railroad Company, are most important to the respective companies and of very great moment to the public welfare, seems to be clearly manifest. If the complainants suffer any damage in consequence, it has not been made to appear to be large, and taking as true, the responsive averments of the answer, it does appear it would be inconsiderable as compared with the loss that would be entailed by the perpetuation of the injunction; and so far as appears, defendant is able to respond in damages for any injury it may have caused the complainants. Its perpetuation would probably result in grievous disaster to defendant and the other company, without any apparent advantage to accrue to complainants.

This is the case as made by the answer, and referring only to such parts of it as may be properly deemed responsive, it is one of those cases in which a court of equity, in the exercise of a sound judicial discretion, refuses to interfere by injunction, leaving the parties to legal remedies. *Wharton v. Hannon* (Ala.), 22 South. 287. But the bill is not without equity, and on a final hearing the denials of the answer may not be supported by the evidence. Nor is the bill incapable of amendment, presenting a case, if facts exist, which would require injunctive relief. The city court properly decreed a dissolution of the injunction, but was in error

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in sustaining the motion to dismiss the bill for want of equity.

The result is the decree must be reversed, and a decree rendered overruling the motion to dismiss the bill for want of equity, and dissolving the injunction, each party paying one-half the costs of appeal, and the cause is remanded.

WALKER *et al.*

v.

GILLETT.

(*Supreme Court of Kansas, March 5, 1898.*)

Fellow Servants—Injuries to Employee—Actions against Receivers.—In an action by an employee against the receivers of a railway company to recover damages for injuries received in the course of his employment, where the appointment and qualification of the receivers are admitted by the answer filed by them, and other issues are presented as to the merits of the case, and the trial proceeding throughout without any question being brought to the attention of the court as to whether the receivers were in possession of the particular train causing the injury, and where the testimony offered and the instructions asked by the defendants impliedly admit that they were operating the train, this court will not reverse a judgment rendered against them merely because of a want of formal proof that the train was operated by employees of the receivers.

Same—Vice Principals.*—At common law, a conductor having full charge and control of a train of cars is not a fellow servant with a brakeman who acts under his orders. In such a case the conductor is the representative of the principal, and the latter is responsible to the brakeman for the conductor's negligence.

Same—Defective Appliances—Negligence—Question for Jury.—Where a conductor of a railway train orders a brakeman to hurry up and examine the couplings and get the train in shape, and promises the brakeman that he will keep watch, and thereafter, while the brakeman is engaged in removing a defective and unsuitable rod used in a coupling, without warning signals the engineer to back other cars against the stationary ones, and thereby causes the brakeman to be run over and maimed, it is within the province of the jury to determine whether the injury is attributable to negli-

*See *Norfolk & W. R. Co. v. Houchens Adm'r* (Va.), 8 Am. & Eng. R. Cas., N. S., 616, and *note* by MR. MCKINNEY, p. 630.

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gence on the part of the conductor or of the brakeman; and a verdict finding the conductor guilty of negligence, and assessing damages against the receivers of the company in charge of the property, will not be disturbed by this court.

(Syllabus by the Court.)

ERROR by defendants from district court, Johnson county. *Affirmed.*

A. A. Hurd, O. J. Wood, W. Littlefield, and Alfred A. Scott, for plaintiffs in error.

A. Smith Devenney, for defendant in error.

ALLEN, J. Fred. E. Gillett received injuries while employed as a brakeman on the Atchison, Topeka & Santa Fe Railroad, at Perry, Okl., resulting in the amputation of his left leg above the knee, and seriously crippling his right foot. This action was brought by him in the district court of Johnson county, against the plaintiffs in error, as receivers of the railroad company, to recover damages for these injuries. In the petition it was alleged that the defendants were at the time of the injury the duly appointed and acting receivers of the railroad company, and were then operating, managing, and controlling the engines and cars of the company through the territory of Oklahoma and the state of Kansas; that the plaintiff was a brakeman in the employ of the defendants on a freight train, under a conductor named Deitrick, who had full charge and control of the train; that at Perry, in the territory of Oklahoma, on November 28, 1894, when the train was standing on the main track, and shortly before its time to depart, the conductor ordered the plaintiff to hurry and examine the air brakes and couplings of the stationary cars of the train; that, in obeying this order, the plaintiff discovered that two of the cars were coupled with a long, slim, bent, iron rod, which was unsafe for use; that plaintiff, in attempting to remove this rod, to insert a coupling pin, was in the act of knocking out the rod, and in a stooping position, when the conductor negligently and without warning caused one or more cars to be driven back by the engine against the stationary

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cars, knocking the plaintiff off his feet, and under the moving cars, whereby he received the injuries before mentioned; that the conductor knew, or by the exercise of ordinary care might have known, that the plaintiff was at the time between the cars. The defendants answered—First, denying generally the averments of the petition; second, alleging that the injury, if any, happened in the territory of Oklahoma, where the common law was in full force; that the negligence, if any, was that of a fellow servant, for which, under the law of Oklahoma, the defendants were not liable; third, that the injuries were caused by the negligence of the plaintiff himself. This answer was not verified. The case was tried, and resulted in a verdict in favor of the plaintiff for \$6,500, on which judgment was entered. The receivers bring the case to this court.

The main contention here is that the court erred in overruling the defendants' demurrer to the testimony offered by the plaintiff. It is said that, while the answer of the defendants admitted the appointment and authority of the receivers, it did not admit that the men in charge of the train when the plaintiff was injured were employees of the receivers; that there was no proof of such employment, and that there was, therefore, a fatal omission of proof of a fact essential to the plaintiff's cause of action. The plaintiff himself testified that at the time of the injury he was braking for the defendant railroad company, the Atchison, Topeka & Santa Fe Railroad Company. His attention does not appear to have been called to the fact that the property of the company was then in the hands of receivers, and no witness was asked any question about the receivers. It may well be doubted whether there is not an implied admission in the answer that the receivers, who pleaded to the merits of the case, were in possession of the property of the railroad company, and actually discharging the duties which devolved on them by virtue of the appointment, which they admitted by their unverified answer. The allegation in the second para-

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graph of the answer that the negligence, if any, causing the injury, was that of a fellow servant of the plaintiff, would seem to imply that the plaintiff was a servant of the defendants. But, whether the ruling of the court on the demurrer to the evidence was right or wrong, the plaintiffs in error are not now in a position to gain any advantage of the technical omission, if such there was. The defendants placed the other trainmen on the stand as witnesses. They all testified that they were working on the Atchison, Topeka & Santa Fe Railroad, or for the Atchison, Topeka & Santa Fe Railroad Company. The trial seems to have been conducted throughout as though the receivers and the railroad company were identical, and the question of the receivership appears to have been treated as a conceded fact. This is made clear by the seventh instruction asked by the receivers. The court was requested to charge the jury that "the defendants, receivers of the railroad company, were not bound by law to use any particular kind of coupling pin; that they had the right, in coupling their cars, to use the iron bolt that they did use if they saw fit to do so." Other parts of the instructions asked also indicate that no question as to the relationship of the receivers to the train which caused the injury to the plaintiff was ever brought to the attention of the trial court. In this state of the case it would be manifestly unfair to reverse the judgment merely on the ground of a want of technical proof of the connection of the receivers with the property which it was manifestly their duty to manage.

The question most discussed is whether the conductor and the plaintiff were fellow servants, within the meaning of the common-law rule obtaining in Oklahoma, which denies the plaintiff a right of recovery for an injury resulting from the negligence of a fellow servant. Counsel for the plaintiffs in error contend that the test as to who are fellow servants is merely whether they are engaged in the same line of service for the same master; that the only difference in the employment of the conductor

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and the plaintiff was that the scope of that of the former was greater than that of the latter, but that the master rests under no greater duty to properly perform the duties of the conductor than those of the brakeman. It must be conceded that the courts have indulged in much refinement of reasoning on the question of who are fellow servants, and that the grounds on which many decisions have been based on either side of the question are not altogether satisfactory. The precise question in this case is whether the master is liable to a brakeman for injuries occasioned by the negligence of the conductor of the train on which he was employed, where the conductor had full charge of the movements of the train, and the brakeman was acting under his orders. In the case of a railway corporation there is no personal master. The stockholders and bondholders have the property interests, but no direct management of the property. Their interests are looked after by a board of directors, which, in turn, employs general officers of greater or less authority, who have the direct and personal supervision of the operation of the property. Where the general power to manage and command is given to one, and the duty of the others is merely to execute and obey, he who directs stands in the place of the principal and the principal must respond to those under him for his misconduct. This must be so, else it is impossible to see how at common law a railroad corporation can ever be responsible to any of its employees for the misconduct of any officer occupying a superior station in the same line of service; for all are servants, and the master is only an intangible corporate entity. In the case of *Railroad Co. v. Seeley*, 54 Kan. 21, 37 Pac. 104, the liability of the company to a brakeman for the negligence of those charged with the duty of loading cars was sustained. Where the injured employee and the one whose negligence occasions the injury are engaged in different branches of corporate service, it seems to be now quite generally held that the common-law rule exempting the master from liability does not apply. It may be that a

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mere matter of difference in the grade of service of the employees is not controlling, but, where one is under the direct and personal supervision and control of the other, it does control.

We shall not attempt anything like a review of all the authorities bearing on this much mooted question, but content ourselves with a few citations sustaining our conclusion. *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184; *Moon's Adm'r v. Railroad Co.*, 49 Am. Rep. 401; *Railway Co. v. Lundstrum* (Neb.), 20 N. W. 198; *Cowles v. Railroad Co.*, 84 N. C. 309. In the case of *Railway Co. v. Ross*, *supra*, it was said by MR. JUSTICE FIELD, delivering the opinion of the court: "There are decisions in the courts of other states more or less in conformity with those cited here; Ohio and Kentucky rejecting or limiting to a greater or less extent the master's exemption from liability to a servant from the negligent conduct of his fellows. We agree with them in holding (and the present case requires no further decision) that the conductor of the railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and, therefore, that, for injuries resulting from his negligent acts, the company is responsible." Great care was taken in the opinion in the case of *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914 (which was an action by a fireman to recover for injuries resulting from the negligence of the engineer), to distinguish it from the case of *Railway Co. v. Ross*. The opinion was delivered by MR. JUSTICE BREWER, MR. JUSTICE FIELD and CHIEF JUSTICE FULLER dissenting. If the court really intended in the latter case to restrict the rule declared in the former, the question being one of general law, we are satisfied with and adhere to the law first declared in *Railway Co. v. Ross*, in its entirety. Whoever has full and unrestricted authority to direct and command is a vice principal, and for his negligence the master must respond.

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But little need be said on the question as to the sufficiency of the proof to sustain the charge of negligence on the part of the conductor. The plaintiff testified that the conductor told him: "You hurry up, and go back and examine your air brakes and couplings, and get the train in shape. I will get the numbers here of these cars, and keep a lookout. We want to get out of the road of No. 23. If we hurry up, we can get over on the passing track out of her way, so as to let her have the main line." There is no question that it was the duty of the plaintiff to obey this order, and to carefully inspect the couplings, and remove any unsafe or defective one, and supply it with a proper one. He was in the discharge of this duty when he was injured. In going between the cars to remove the bent rod, he necessarily went where he could not see what was being done, and where he was out of sight of the conductor. The conductor knew when he gave the order that, in making any change of couplings, he would necessarily go between the cars. Notwithstanding this, and his assurance to the plaintiff that he would keep watch, he gave the signal to the engineer to back down the cars against the stationary ones, resulting in running over the plaintiff. Under this state of facts, it was within the province of the jury to determine that the conductor was guilty of negligence, and that it was his fault, rather than that of the plaintiff, that caused the injury. The conductor being the representative of the receivers in the management of the train, they must respond in damages for his negligence. We find nothing in the special findings inconsistent with the general verdict, and the questions discussed on the motion for a new trial are substantially those presented on the merits of the case. The judgment is affirmed. All the justices concurring.

Same—Defective
Appliances—Negli-
gence—Question
for Jury.

Williams v. Delaware, L. & W. R. Co

WILLIAMS

v.

DELAWARE, L. & W. R. Co.

(*Court of Appeals of New York, March 1, 1898.*)

Injury to Employee*—Assumption of Risk—Negligence—Question for Jury.—In an action by an employee for personal injuries sustained by him while on the top of a car as it was going under a low bridge, plaintiff testified that he did not know that it was a low bridge. *Held*, that the principle that a servant assumes the risks incident to his employment did not apply to accident under such circumstances; and the case should have been submitted to the jury.

APPEAL by plaintiff from supreme court, general term, Fourth department. *Reversed.*

Watson T. Dunmore, for appellant.

Wm. Kernan, for respondent.

PARKER, C. J. On a former appeal this court, by its Second division, held that this plaintiff should have been nonsuited because it appeared that he knew, or at least should have known, that the bridge under which the train was passing was not high enough to permit him to pass under it while standing erect upon the top of a box car; the principle applied being that "a servant who enters upon employment from its nature hazardous assumes the usual risks and perils of the service, and of the open, visible structures known to him, or of which he must have known had he exercised ordinary care and observation." See *Williams v. Railroad Co.*, 116 N. Y. 628-634, 22 N. E. 1117. It then appeared that, while standing on top of a car, he was struck by a bridge over the track, and was in-

*As to Liability of Company for Injuries to Employee from Overhead Structure, see *Gusman v. Caffery Cent., etc., R. Co. (La.)*, 8 Am. & Eng. R. Cas., N. S., 463, and *notes*, p. 470.

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jured. He had run upon this train for over three weeks, and during this time had passed daily under this bridge, and frequently on top of a box car, where he was required to be in the performance of his duty. The accident occurred in the daytime. The bridge was in plain sight, and, knowing the train was about to pass under it, he turned his back to it, and was going towards the rear of the car when he was struck. While the case was on the border line, it seems to have been well decided. But in the record now before us the testimony of the plaintiff is very different; so different that, had it appeared in the first record, the result of the former appeal must have been an affirmance of the judgment, instead of a reversal. Applying on this review the usual rule which obtains in the case of a nonsuit, that a plaintiff is entitled to have treated as true the testimony most favorable to him, it becomes simply an impossibility to affirm the judgment. Every principle of law applicable to such a situation commands its reversal. No one has given evidence of the courage to assert otherwise.

The plaintiff testified on this trial that prior to the accident he never passed under the Norwich Bridge on top of a box car, and that he did not know it was a low bridge. Surely, it cannot be argued in the face of such evidence that the plaintiff knew or ought to have known that it was a low bridge. This suggests the query: Why, then, did the trial court grant the nonsuit, and how came the general term to affirm it? An extract from the brief of the learned counsel for the respondent will perhaps best present the answer, and I quote it: "The learned judge who presided on the second trial presided on the last trial, and granted the nonsuit. He saw and heard the testimony of the plaintiff on both trials, and did not believe that the change of his testimony was honest or worthy of belief. The general term evidently was of the same opinion, for, after a careful examination of the evidence before the court of appeals and that given on the last trial, while admitting that the evidence of the plaintiff was some-

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what different on the last trial, it declined to disturb the decision of the trial court; especially in view of the apparent disingenuousness of the plaintiff in giving his testimony upon the last trial, and his obvious effort to so change his evidence as to avoid the former decision in this case." In other words, the court, believing that the plaintiff had changed his testimony falsely, with a view of avoiding the effect of the decision of this court, concluded to disregard his testimony on this trial, and held that what he testified to on the former trial was true. There can be no doubt but the learned courts below, both at trial and general term, were actuated in their course by most praiseworthy motives, fully believing that they were promoting good morals, honesty, and justice; but the question is, was their holding in accordance with law? On one of the trials it is quite likely that the plaintiff's testimony was truthfully given; but whether on the first or the second trial was for the jury, not the court, to determine. It is the province of the former, not the latter, to weigh the testimony given in the light of all the circumstances surrounding it. How testimony should be treated which is affected by contradictions and inconsistencies, or by evidence making its falsity manifest, and establishing a consciousness in the witness of its falsity was carefully considered by GRAY, J., in *People v. Chapleau*, 121 N. Y. 266, 24 N. E. 469, and the conclusion reached that prior to the enactment of section 714 of the Penal Code and section 832 of the Code of Civil Procedure, it was the general rule that the question of the credibility of a witness was one for the jury, the only exception being where the discrepancies in the testimony were the result of deliberate falsehood; but since their enactment it is "the rule and policy of the law to allow all testimony to go to, and be weighed by, the jury." The case of *Hunter v. Railroad Co.*, 116 N. Y. 615, 23 N. E. 9, and 130 N. Y. 669, 29 N. E. 1034, presented precisely the same question as here. Hunter was injured by being struck by the roof of a tunnel while passing through it on top

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of a box car. Upon the first trial he testified that the last he remembered he was sitting upon the top of a box car. The undisputed evidence showed that it was impossible for the roof to have struck his head while sitting on top of the car, and therefore the conclusion was reached that the injuries could not have been caused by the negligence complained of, and the judgment was reversed. On the second trial Hunter testified that he was not sitting down, but was standing on top of the box car when he ceased to remember. The plaintiff recovered, and the judgment was finally affirmed in this court, and necessarily so, because the court could not hold, as matter of law, that he was not entitled to have his testimony considered by the jury. In this case the plaintiff gave testimony which, if credited by the jury, would have entitled him to a verdict. The trial judge apparently did not credit it, and it is quite likely that his view of the testimony was the correct one; but the difficulty with the situation is that, under our method of procedure, it was the province of the jury, not the court, to say whether his testimony was entitled to belief. The judgment should be reversed, and a new trial granted, with costs to abide the event. All concur, except GRAY, J., absent, and MARTIN, J., not sitting. Judgment reversed.

Wright v. Northampton & H. R. Co

WRIGHT

v.

NORTHAMPTON & H. R. Co.

(*Supreme Court of North Carolina, March 1, 1898.*)

Injury to Employee—Vice Principals.—Plaintiff, a section master, was injured while riding home on one of his employer's engines after his day's work was over, it being his custom to go to his sleeping place either on a hand car or on one of defendant's trains, no fare being at any time accepted from him for such transportation. *Held*, that the conductor in charge of such engine was not a vice principal as to plaintiff, but a fellow servant.

Same—Passengers.*—Plaintiff was not a passenger when injured.

APPEAL by defendant from Northampton county superior court. *Reversed.*

McRae & Day and *W. W. Peebles & Son*, for appellant.

R. B. Peebles, for appellee.

MONTGOMERY, J. This action was commenced on the 1st day of March, 1895, and the plaintiff's object was to recover of the defendant company damages for injuries which the plaintiff alleged he had sustained on account of the negligence of the defendant. Whether or not the plaintiff and the engineer (Lester) of the defendant company were fellow servants when the plaintiff was injured is the question raised by the defendant's exceptions to his honor's instructions to the jury on that point. The third issue submitted to the jury was in the following words: "Was the plaintiff injured by the negligence of a fellow servant? If so, which one?" The jury in response answered, "No." Upon that issue the court instructed the jury

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Injury to Employee
— Vice Principals.

*As to Employees as Passengers, see *McNulty v. Pennsylvania R. Co. (Pa.)*, 8 Am. & Eng. R. Cas., N. S., 685, and *notes*, p 689.

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that if the train on which the plaintiff was riding at the time he was injured was under control of Lester, he acting both as engineer and conductor, then the plaintiff and Lester were not fellow servants, and the jury should answer the third issue, "No." There was error in that instruction. That Lester was engineer and conductor did not constitute him a vice principal as to the plaintiff. A section master's duties have no connection whatever with the train service, and for the performance of his duties he is not responsible to the conductors of trains. A conductor stands in the relation of vice principal only to such employees of the common master as have employment on his own train, and who are under his orders and subject to his command. *Shadd v. Railroad Co.*, 116 N. C. 968, 21 S. E. 554; *Pleasants v. Railroad Co.*, 121 N. C. 492, 28 S. E. 267. His honor further instructed the jury that if they believed the evidence they should answer the first issue, "Yes." That issue was in these words: "Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?" The complaint alleged that the plaintiff was a passenger on the defendant's train, and not an employee, and also that the general manager, who was also superintendent, was present at the time the plaintiff was injured, and gave the order to the engineer which resulted in the plaintiff's injury. His honor erred in giving this instruction. In reference to the conduct of the superintendent and general manager, Kell, the plaintiff testified that that officer was on the engine, and, upon being informed by the engineer that the headlight was out, and asked by the superior whether he should go ahead, answered, "Yes; go ahead." Kell, in his testimony, said that he never spoke to the engineer on the subject, nor did he give him any orders on the occasion. The contention of the plaintiff was that when the manager and superintendent ordered the engineer to go ahead on a dark night, and without a light, the plaintiff suffering injury by the engine being driven over the "bumping post," the plaintiff's injury was the consequence

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of the order, and that the company was therefore liable. But the plaintiff's testimony was flatly contradicted by that of the superintendent, and the matter should have been submitted to the jury. The facts, as they bear upon the question as to whether the plaintiff was a passenger on the defendant's train, are as follows: The plaintiff was a section master in the employment of the defendant, and slept sometimes at Gumberry, the northern terminus of the road, sometimes at Jackson, the southern terminus, and sometimes at Mowfield, an intermediate station. After his day's work was over he went to his sleeping place on a hand car or on the defendant's train, as suited his convenience. On the night when the plaintiff was injured, he and the laborers working under him having left off work for the day, with a light for a signal on the side of the railroad, were waiting for the train on its way to Gumberry. All were taken on, the plaintiff getting on the engine, and the hands on the flat cars loaded with logs. No fares at any time were received or expected from the plaintiff. These facts do not, in our opinion, constitute the plaintiff a passenger on the train. He invariably used the hand car or the train of the company to aid him in the prosecution of his work. The act of going to and from his work in the manner pointed out, although for the benefit of the plaintiff, connects him with the service of the company, although he was not actually engaged in the work for which he was employed at the time of his injury. If there had been a contract between the plaintiff and the company that the plaintiff should be carried to and from his work to his sleeping place, then certainly the plaintiff would have been injured while engaged in the service for which he was employed. *State v. Western Maryland R. Co.*, 63 Md. 433; *Tunney v. Railroad*, L. R. 1 C. P. 291; *Seaver v. Railroad Co.*, 14 Gray, 466. Again, if it cannot be inferred from the evidence that there was a contract between the parties to the effect that the plaintiff was to be carried to and from his place of labor by the defendant,

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there does appear a privilege permitted to the plaintiff to use the defendant's train whenever he chose to use it, and of which he availed himself, to aid and facilitate his labors and service, and connects him, by such privilege and user, with the service of the company, and thereby creates the relation of fellow servant between him and the engineer. *Gillshannon v. Railroad Corp.*, 10 Cush. 228. There was error as pointed out. New trial.

DOUGLAS, J., dissents arguendo.

GAINESVILLE, J. & S. R. Co.

v.

EDMONDSON *et al.*

(*Supreme Court of Georgia, July 20, 1897.*)

Fires Set by Locomotives—Presumption of Negligence.—To authorize a plaintiff to recover damages from a railroad company for the destruction of property by fire caused by the running of its locomotive, it must appear that such damage was occasioned by the fault or negligence of the company or its agents. If, without more, it should be shown that the fire was occasioned by operation of the locomotive, negligence on the part of the company would be presumed.

Same—Negligence—Sufficiency of Evidence.*—When, however, the evidence only raises a suspicion that fire was communicated to the property destroyed by the passing engine, and the uncontradicted testimony was that the engine was in good order, and equipped with a proper spark arrester in good condition, and no evidence appearing that in the handling of the engine sparks were emitted or fire thrown therefrom at the time, before, or after the conflagration for which damages are sought, a legal recovery cannot be had, and the court erred in refusing to grant a new trial.

(Syllabus by the Court.)

ERROR by defendant from Walton county superior court. *Reversed.*

The following is the official report:

*As to Fires—Sufficiency of Evidence, see *Van Steuben v. Central R. Co. (Pa.)*, 9 Am. & Eng. R. Cas., N. S., 485, and *note*, p. 493.

This was a suit against the railroad company to recover damages resulting from the burning of a gin house. To the refusal of a new trial after the rendition of a second verdict for the plaintiffs, the defendant excepted. The company's right of way extended 50 feet from the centre of its track. The house was built about 1887, after the railroad was built, and extended about 11 feet upon the right of way. After the house had been built, a side track was constructed between the main track and the house, and was used to ship seed from the house. The company acquired its right of way by a deed from Mrs. Gresham, made in 1880, reserving to her and her heirs and assigns "the right to use and cultivate said right of way to the roadbed." In 1886 she conveyed to Elisha Gresham 154 acres of land, which includes a one-acre lot which passed to the plaintiffs by successive conveyances, beginning with Elisha Gresham, in August, 1888, describing the acre conveyed as beginning at the public road at Gresham's crossing on the east side of the railroad, "running down said railroad to Larkin Stewart's line," etc. The other deeds describe the west line of the lot as "running south along said railroad," until in 1891, when a half interest in the lot was conveyed by a deed describing said west line as "running along right of way on east side of said" railroad. The burning occurred about three o'clock in an afternoon in April, 1894. There had been no fire in or about the house for several days. The engine of defendant's train had stopped about 40 feet from the house, this being at or near the usual place of stopping at Whitney Station. The weather was dry and windy, the wind blowing from the northwest, and in the direction of the house. The train stopped for 2 or 3 minutes, and, 10 or 15 minutes after it left, the house was found burning on the southwest corner, next to the railroad. There was conflict in the testimony as to whether the engine was roaring, and had on the blower when it stopped at the station. The ground underneath the house had been cleaned off about three

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months before. According to some testimony, the fire was coming straight out from the inside of the house; while other testimony indicates that it was burning up through the floor under the house when discovered. It was right under the middle of the building, and had burned considerably. The house was four or five feet above the ground. There was testimony for defendant that, according to the direction in which the wind was blowing, the sparks, if any had escaped, would have blown to the south of the house, instead of towards it; and that the engine was in proper condition, including the spark arrester in the smokestack, which was the best-known device for preventing the escape of sparks.

Jos. B. & Bryan Cumming and Henry D. McDaniel,
for plaintiff in error.

W. S. McHenry, for defendants in error.

LITTLE, J. An action was brought against the railroad company to recover damages sustained by reason of the burning of a gin house and certain valuable contents. The petition alleged that the burning was caused by the negligence of the company and its agents in and about the running of its locomotives and machinery by negligently and carelessly throwing out sparks from the locomotives. The plaintiffs had a verdict. The defendant company made a motion for a new trial, which was refused, and it excepted. The motion contains several grounds relating to the charge of the court and its refusal to charge. As, however, the case goes back, and our judgment of reversal is made on the ground that the verdict is contrary to the evidence, we do not deem it necessary to pass on the other alleged errors set out in the motion.

1. The rule by which a railroad company can be held liable for damages occasioned by fire emitted from or otherwise thrown out by its locomotives is well settled. The law governing this class of cases is necessarily, from the comparatively recent use of steam in the propelling of cars on railroads, of modern origin, and the

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principles which control the cases are derived by analogy. One of the earliest cases to which our attention has been called is that of *Vaughan v. Railway Co.*, an English case decided in 1858, and reported in 3 Hurl. & N. 742. In this case the court of exchequer held that railroad companies, by using fire, were responsible for any accident which might result from its use. On appeal, however, the court of exchequer chamber reversed this ruling, and the doctrine is now clearly and well established that when the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it is authorized, and every reasonable precaution is observed to prevent injury, the sanction of the legislature carries with it this consequence: that, if damage results from the use of such thing, the party using it is not responsible. Therefore, in cases of railroads authorized to propel their cars by steam, the gist of their liability for injuries caused by the escape of fire is negligence. This is now the law of England and of every state in the Union except where altered by statute. 1 Thomp. Neg. p. 152, par. 8, citing a large number of cases in note 7 which fully support the text. We have in this state no statute law which changes this rule of liability, and, unless in cases of this character the fire is occasioned by some act of negligence on the part of the company or its agents, no liability attaches to the railroad company to respond for the damages sustained. *Railroad Co. v. Lawrence*, 74 Ga. 534. See, also, *Railway Co. v. Timmermann*, 61 Tex. 660; *Railroad Co. v. Schultz*, 2 Am. & Eng. R. Cas. 275, and note. This negligence must refer either to the condition of the locomotive from which the fire emanated, or to its handling or management at the time the fire was occasioned. *Johnson v. Railroad Co.* (N. D.), 48 N. W. 227. It will be understood of course, that this rule of liability is not exhaustive of the entire scope of a railroad's responsibility in fire cases, but is applicable to the questions made by the pleadings and evidence in this case. Modern science and ingenuity have not yet

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reached a point where it is possible to propel locomotives by the use of steam in such manner as to absolutely prevent the emission of sparks of fire in their operation. The law does not require that engines shall be so constructed, equipped, or managed as that no sparks of fire shall escape from them; and, even if a fire does originate from a spark thrown out by a locomotive, that of itself does not, without more, render the defendant liable. Negligence must be made to appear. *White v. Railroad Co.* (S. D.), 47 N. W. 146. Assuming in this case that the burning of the house was occasioned by fire thrown out from the engine, the defendant is to be held liable or not, as the facts establish or fail to establish negligence on its part; and, in determining that question, the condition of the engine and the manner in which it was handled at the time of the fire will control the finding. Not many of the states have statutes which raise a presumption of negligence when an injury is shown to have been occasioned by the running of the locomotives and cars. In some it has been held that, when a fire has been shown to have occurred by this means, the plaintiff must go further, and show negligence. *Brown v. Railway Co.*, 13 Am. & Eng. R. Cas. 488, note. In other states it has been held that proof of the fact that the fire was occasioned by the escape of sparks from a passing engine raises a presumption of negligence. *Railroad Co. v. Schultz*, 2 Am. & Eng. R. Cas. 271. In this state there is no question on this point. In the case of *Railroad Co. v. Hesters*, 90 Ga. 11, 15 S. E. 828, this court held that when the declaration alleges that the company, by its servants in the operation of its locomotives, did negligently and carelessly throw out fire, whereby property of the plaintiff was burned, the rule of the Code raises a presumption of negligence on proof that plaintiff's property was so burned. But, in jurisdictions where a presumption of negligence arises on proof that the fire was set by the defendant's locomotive, the plaintiff must show that the company set the

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fire, at least, in order to make out a *prima facie* case. Reed v. Railway Co., 50 Mo. App. 504 ; Railroad Co., v. Strotz, 47 Ill. App. 342 ; Niskern v. Railway Co., 22 Fed. 811. We may take it as the established law of this state that, when proof is made that the property of one person has been injured or destroyed by fire occasioned by sparks from a locomotive, the burden is on the railroad company to show that the emission of such sparks, or the escape of the fire from the locomotive, was not due to the want of ordinary diligence on the part of itself or its servants, either as to the condition of the locomotive or in its management and operation. It is always incumbent on the plaintiff to make proof that the fire was communicated by the locomotive of the defendant. But few cases will occur, however, where the fact that the fire was communicated is susceptible of direct proof. Consequently, such proof must be more or less circumstantial. The evidence, however, must be sufficient to establish a reasonable inference that the fire originated from sparks or fire emitted or thrown out by the locomotives of the company. If it raises only a mere conjecture as to whether the fire was or was not so occasioned, no recovery can be had. Megow v. Railway Co., 86 Wis. 468, 56 N. W. 1099. If it is sufficient to fix the source of the fire upon the railroad company, the law of this state, by the presumption before referred to, makes a *prima facie* case, which, if not rebutted, entitles the plaintiff to a recovery.

2. A careful examination of the record in this case as to the origin of the fire raises, at most, only a suspicion that it was occasioned by sparks issuing from the locomotive in passing the gin house, or when it was standing near it at the station. We say a suspicion, because fires near a railroad track may occur from other causes than from the locomotive. There is no presumption that the fire did occur from the locomotive, and, of course, no presumption of negligence until the fact that the fire originated from the locomotive has been

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—Sufficiency of
Evidence.

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satisfactorily shown. It will not be sufficient for the plaintiff to prove that the fire might have proceeded from the defendant's locomotive, but he must show by reasonable evidence that it did so originate. As we have stated before, however, it is not necessary to prove this beyond a reasonable doubt. *Johnson v. Railroad Co.* (N. D.), 48 N. W. 227. Even if we assume in the present case that the evidence was sufficient to warrant the finding that the fire was occasioned by sparks emitted from the locomotive, and give full effect to the presumption of negligence which arises on this proof, and consequently hold the defendant to the duty of rebutting such presumption, it would seem that it has here sufficiently been done. The condition of the locomotive at the time of the fire is not shown by the proof offered by the plaintiffs to have been had, nor does such proof tend to show that it was improperly handled. It is true that it is shown by the evidence of a witness that, at the time the engine stopped at the station near the house, the blower was on. It does not in any way follow that this was improper or negligent. The burden which the defendant carried was to rebut the presumption of negligence. On the part of the defendant it was shown that the locomotive was equipped with an approved spark arrester; that it was in good condition; that no fire escaped which could have reasonably been prevented. Witnesses were also introduced who testified to the proper and careful handling of the machine. We do not find in the record the testimony of any witness which negatives either of these propositions. If the engine was in the condition in which the undisputed evidence shows it to have been, if it was properly and carefully handled and operated, then, under the law, as we have seen, the defendant company is not liable; and, as nothing to the contrary appears in the record, we conclude that the presumption of negligence, even if it arose, was rebutted, and the court below should have granted a new trial. Judgment reversed. All the justices concurring.

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BROWN
v.
BENSON.
McDOWELL
v.
SAME.

(Supreme Court of Georgia, July 10, 1897.)

Fires Set by Locomotives—Bill of Exceptions—Evidence of Regularity.—The additional certificates filed by the clerk of the superior court showing the time at which that court adjourned, and, consequently, that the bills of exceptions were presented within the time required by law, the motions to dismiss the same are overruled.

Same—Defective Appliances—Allegations—Admissibility of Evidence.—Where, in a suit against the receiver of a railroad company to recover damages resulting from the burning of woodland by fire alleged to have originated from sparks thrown out by the locomotive, the negligence alleged was that the spark arrester was out of order and unfit for use, and that the engine was defective and dangerous, and, in consequence of the defective condition of the spark arrester and engine, sparks and cinders were emitted in dangerous quantities, etc., such allegations were broad enough to admit evidence touching the condition of the grates of the engine at the time of the fire; and, accordingly, it was error to rule out testimony to the effect that on the day of the fire the grates of the engine were burned out, and large quantities of fire would fall out of the fire box down on the track.

Same—Same—Other Fires—Evidence.*—Evidence showing the condition of the spark arrester of the same engine just preceding and a short while subsequent to the date of the fire, and also that other fires were caused prior thereto by the same engine, was admissible as showing the condition of such engine at such times, from which, in the absence of testimony showing that the locomotive was in proper condition at the time of the fire, the jury might infer that the defective condition of such engine existed at the date of the fire.

Same—Negligence—Question for Jury.—The testimony admitted, together with that improperly excluded, was sufficient to send the

*As to Admissibility of Evidence of Other Fires, see *Thomas v. New York, C. & St. L. R. Co. (Pa.)*, 9 Am. & Eng. R. Cas., N. S., 132, and *note*, p. 135.

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case to the jury for them to determine whether or not the fire originated from sparks thrown out by the locomotive of the defendant, and whether or not, at the time of the fire, the defendant was negligent, in that the locomotive was not in proper and reasonably safe repair; and therefore it follows that the court erred in granting a nonsuit.

(Syllabus by the Court.)

ERROR by plaintiffs from Hart county superior court.
Reversed.

The following is the official report.

These two suits were brought against the receiver of the Hartwell Railroad Company for damages resulting to the plaintiffs by the burning of their woodlands by fire which they claimed to have been thrown out from the locomotive of a train running on the railroad. A nonsuit was granted, to which ruling, and to two others hereafter noted, exceptions were taken. The testimony was, in brief, as follows: About 10 o'clock on the morning of April 21, 1894, the train running from Hartwell to Bowersville passed by one Heaton, who was plowing in a field. About 5 or 10 minutes afterwards, his attention was attracted to a call of fire down the railroad 350 yards. He was in plain view of the place where the fire originated. He saw no fire there before the train passed. The wind was blowing. He could not put out the fire. It appeared to have caught four feet from the roadbed, and spread to a pile of rotten crossties on the right of way, and had burned over a space as large as the court room when he reached there. The wind was blowing hard from the southwest, blowing smoke from the stack of the engine over on the ground, and on the same side the fire originated. The engine was the "Nancy Hart." Heaton was in plain view of the place where the fire started. There was no evidence of fire there until immediately after the train passed. The fire spread from the railroad to the land of each of the plaintiffs, first over McDowell's, then over Brown's. By the fire these lands were damaged from three to four dollars per acre, being that much reduced in value thereby. The lands were heavily covered with leaves,

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trash, and litter. Plaintiffs' title deeds were in evidence. Powell was brakeman on the railroad at the time of the fire. About the 1st, and not later than the 10th, of April, 1894, he noticed this engine throwing out of the stack large quantities of sparks. In February it threw out sparks, and set afire his clothes and some waste on a car. At night from the 1st to the 10th of April preceding the fire, on the 21st, they were hauling freight at nights, and large quantities of sparks were thrown out. The stack was in a defective condition at those times. On the day of the fire, the grates of the engine were burned out, and large quantities of fire would fall out of the fire box down on the track. It was not repaired until McDonald repaired it, in July. Defendant moved to rule out Powell's testimony, because it was too remote to show the condition of the smokstack at the time of the fire, and because the declaration "did not set out defective grates." The motion was sustained. The negligence alleged in the declaration was that the engine was defective and dangerous. The spark arrester in its smokestack was out of order and unfit for use, and it threw sparks dangerously, which facts were known to defendant, or could have been known by reasonable care and attention on his part; "and, in consequence of the defective condition of said spark arrester and engine," sparks and cinders were emitted in such quantities as to cause danger to the property all along the line of the railroad, and especially to such inflammable material as dry grass, weeds, dead broom straw, and combustibles as were carelessly and negligently permitted to grow and accumulate on defendant's roadbed and right of way, which was in close proximity to petitioner's land; but defendant and his servants negligently used "said defective engine," whereby said fire was caused, etc. McDonald swore that he was a machinist, and repaired the smokestack of the engine on the Hartwell Railroad on July 4, 1894. It had a hole in the stack about "as large as your thumb." He noticed other holes in it that had bolts run through them. In December of

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the same year he patched another hole of the same size. Large sparks would come out of these holes. No other work had been done on the stack, that he could see. On defendant's objection, this testimony was ruled out, because it failed to show that the stack was defective on April 21, 1894.

O. C. Brown and J. H. Skelton, for plaintiffs in error.

A. G. McCurry, for defendant in error.

LITTLE, J. The facts are set out in the official report. These two cases, involving the same facts, and necessarily governed by the same principles of law, were consolidated and argued together in this court. The case of *Brown v. Benson*, receiver, has heretofore been passed on by this court. Practically the same evidence is here now in both cases as was in the former record of that case. Then the judge below granted a nonsuit in the case, which was reversed by this court. See 98 Ga. 372, 25 S. E. 455. A nonsuit was also granted in the present cases, and exception is taken thereto, and also to certain rulings of the court, which we will now consider.

1. There was a motion to dismiss the writs of error in these cases because they did not show that the bills of exceptions were certified within the time prescribed by law. The additional certificates, however, filed by the clerk of the superior court, show at what time the court adjourned. From this certificate it now appears that the bills of exceptions were presented within the legal limit of time, and the motion to dismiss must therefore be overruled.

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2, 3. The petitions in the cases allege that the defendants injured and damaged the plaintiffs by fire burning over their land on the 21st day of April, 1894, and that such burning was occasioned by fire thrown out from the locomotive of the defendant by its negligence. The negligence alleged was that the spark

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arrester was out of order, and unfit for use, and that the engine was defective and dangerous, and, in consequence of the defective condition of the spark arrester and engine, sparks were emitted in dangerous quantities, etc. Under this declaration, evidence of Powell, a brakeman on the train at the time of the fire, to the effect that about the 1st, and not later than the 10th, of April, 1894, he noticed this engine throwing out large quantities of sparks; that in February it threw out sparks, and set afire his clothes and some waste on a car; from the 1st to the 10th of April preceding the fire on the 21st, they were hauling freight at night, and large quantities of sparks were thrown out; the stack was in a defective condition at those times; on the day of the fire the grates of the engine were burned out, and large quantities of fire would fall out of the fire box down on the track; it was not repaired until McDonald repaired it, in July,—was, on motion, ruled out by the court, because it was too remote to show the condition of the smokestack at the time of the fire, and because the declaration did not set out defective grates. The testimony of McDonald, who swore that he was a machinist, and repaired the smokestack of the engine on the Hartwell Railroad on July 4, 1894; that it had a hole in the stack about as large as your thumb; he noticed other holes in it that had bolts run through them; that in December of the same year he patched another hole of the same size; that large sparks would come out of these holes; that no other work had been done on the stack that he could see,—was also ruled out by the court, because it failed to show that the stack was defective in 1894. In our judgment, the evidence of these two witnesses was improperly excluded by the court. The plaintiffs, if they were entitled to recover at all, could only recover by showing that the defendant was guilty of negligence, either by operating its locomotive when it was in an improper and dangerous condition, or that, being in good condition, it was improperly handled in its operation. The petition specifically alleged that the spark arrester

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was out of order, and unfit for use, and that the engine was defective and dangerous, and, in consequence of such defects, sparks and cinders were emitted in dangerous quantities. It will be noted that the alleged defects went not only to the spark arrester, but to the locomotive itself, it being alleged that it was defective and dangerous. It will be noted that the word "engine" is used in the petition and by the witnesses in a colloquial, and not in a technical, sense, intended to describe the locomotive engine or machine which drew the cars. Perhaps the term might have been restricted to its technical meaning had it been so desired by the defendant, but, as used in the pleadings and throughout the trial of the case, it must be considered as referring to the entire machine. In such a sense, the "grates of the engine" would be understood, not to mean any part of that particular contrivance by which the steam itself is applied to the wheels, but as one of the component parts which go to make up and complete a machine in position to propel railroad cars by steam. In such a sense the grates of the engine are certainly parts of that machine, and in cases of this character very important parts. An allegation, as used here, that the engine was defective and dangerous was broad enough to cover a defect in the grates. The allegations in the petitions were broad enough to admit this evidence. It was material, and it was therefore error to have excluded it. In ruling out the testimony of Powell and McDonald, the court did so for the reason, in addition to that above stated, that Powell's testimony was too remote to show the condition of the smokestack at the time of the fire, and that McDonald's evidence failed to show that the smokestack was defective on April 21, 1894, the date of the fire. The effect of Powell's testimony was that this engine, from the 1st to the 10th of April, was in a defective condition; that it threw out of the stack large quantities of sparks; that, in February preceding, it threw out sparks and set fire to waste on a car, and that it was not repaired until McDonald repaired it in July. If

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these facts were true, they clearly establish the proposition that on the 21st day of April, 1894, the locomotive was in an improper and defective condition, because its condition was shown in February to be bad, and from the 1st to the 10th of April to have been bad, and that it had not been bettered until the succeeding July. We are not now on the question as to whether fire was set out by the engine on the day named, but are to consider the question of the condition of the locomotive on that date; and when it is shown that such condition was bad two months previously and ten days previous to the fire, and that no repairs or change had been made in the machine until three months following the fire, the condition of the locomotive is presumptively shown to be bad at the date of the fire. The testimony was admissible and relevant to the question at issue, and its weight was for the jury. Following the testimony of Powell, McDonald swore that he was a machinist, that in July he found, when he was called to repair the locomotive, certain defects in the machine; and that these defects were sufficient to emit large quantities of fire. As tending to show that fire was set out by the defendant, it has been held competent to prove that, at various times before the fire occurred, the engines of the company set out fires along its line in the vicinity. *Railroad Co. v. Richardson*, 91 U. S. 454; *Henderson v. Railroad Co.*, 144 Pa. St. 461, 22 Atl. 851; *Field v. Railroad Co.*, 32 N. Y. 339; *Webb v. Railroad Co.*, 49 N. Y. 420; *Koontz v. Navigation Co. (Or.)*, 23 Pac. 820; *Steele v. Railway Co.*, 74 Cal. 323, 15 Pac. 851. Where the particular engine which set the fire is known and designated, proof that it set other fires is admissible. *Ireland v. Railroad Co.*, 79 Mich. 163, 44 N. W. 426. Where evidence is admissible of other fires, it must appear that the fires were not very remote from the fire causing the damage. If the fires are remote in time, it must appear that the machinery and appliances remained in the same condition of repair, or the evidence will not be admitted.

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Collins v. Railroad Co., 109 N. Y. 243, 16 N. E. 50. Reasonable latitude must, of course, be allowed. The purpose of such proofs would be defeated if they were confined to the exact or precise time of the occurrence. *Henderson v. Railroad Co.*, 144 Pa. St. 461, 22 Atl. 851. It has been held competent to show that coals of fire had previously dropped or been found on the track at or near the place where the injury occurred. *Smith v. Railroad Co.*, 10 R. I. 22; *Railroad Co. v. Chase*, 11 Can. 47. Where the plaintiff seeks to confine the setting of the fire to a single engine, proof that the same engine set other fires is admissible. *Patton v. Railway Co.*, 87 Mo. 117; *Railroad Co. v. Bales*, 16 Kan. 252; *Railway Co. v. McCorkle*, 12 Ind. App. 691, 40 N. E. 26; *Railroad Co. v. Middlecoff*, 150 Ill. 27, 37 N. E. 660. That evidence of other fires set out by the same engine is admissible as tending to show negligence, and that former fires by the same engine are admissible as evidence tending to prove its continued condition or construction, see *Ireland v. Railroad Co.*, 79 Mich. 163, 44 N. W. 426; *Coale v. Railroad Co.*, 60 Mo. 227; *Railway Co. v. Rogers*, 76 Va. 443; *Gibbons v. Railroad Co.*, 58 Wis. 335, 17 N. W. 132; *Slossen v. Railroad Co.*, 60 Iowa, 215, 14 N. W. 244; *Lanning v. Railroad Co.*, 68 Iowa, 502, 27 N. W. 478; *Railroad Co. v. Woodruff*, 4 Md. 242; *Jacksonville, T. & K. W. Ry. Co. v. Peninsula Land, Transp. & Mfg. Co.*, 27 Fla. 1, 9 South. 661; 3 Elliott, R. R. §§ 1243, 1244.

4. The testimony of the witness Heaton, which was admitted, and that of the witnesses which was excluded, was sufficient to send the case to the jury.

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Jury.

It was incumbent upon the plaintiffs to show that the fire was occasioned by sparks emitted from the engine, or otherwise coming from that machine. As we have before seen, some of the excluded evidence that the same engine had previously set out fires was competent to go to the jury, and in certain limits it might be inferred that the fire in question was caused from the same source. Whenever the plaintiff shall have shown by satisfactory evidence

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that the fire originated from this source, the law presumes the defendant to have been negligent in operating a defective locomotive, or in improperly handling it, if it was in good condition. The question of the source of the fire under this evidence, and of the negligence of the defendant, is to be considered and passed on by the jury. As to the rules of law governing the liability of railroads in such cases, see the case of Railroad Co. v. Edmondson, (decided at this term) 29 S. E. 213. We are clear that these cases should have been sent to the jury. The evidence which was excluded by the court should have gone to them, and been considered in connection with the testimony which was admitted. The grant of the nonsuit was therefore error, and the judgments in the respective cases are reversed. All the justices concurring, except COBB. J., disqualified.

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v.

PHILADELPHIA & R. R. Co. *et al.**(Circuit Court of Appeals, Third Circuit, January 7, 1898.)*

Receivers—Car-Trust Leases—Rental.*—Where a railroad company holds rolling stock under a car-trust lease, title thereto remaining in the lessor until the purchase money is paid by the rental, the lessor is entitled to reasonable compensation for the use of the stock by the receiver of such company, though the cars are subsequently returned to the lessor.

Use of Leased Rolling Stock—Assumption of Obligations.—A receiver does not assume liabilities under a car-trust lease by merely taking possession of the leased rolling stock, and using it temporarily, under his order of appointment; but is entitled to a reasonable time to decide whether or not the assumption of such obligations is desirable.

Same—Liability of Receiver's Representative.—Where a receiver, under sanction of the court, turns over all the assets, including the leased rolling stock, to another railroad company, and the latter

*See note at end of case.

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agrees to pay all "operating expenses," the lessor is entitled to reasonable compensation for the use of the leased rolling stock from the latter company as the "agent and representative" of the receiver.

APPEAL from the United States Circuit Court for the Eastern District of Pennsylvania.

Appeal by the Central Car-Trust Company from a decree of the circuit court of the United States for the Eastern district of Pennsylvania, in the suit of Thomas C. Platt against the Philadelphia & Reading Railroad Company and others.

J. S. Clark, for appellant.

Thomas Hart, Jr., for appellee Philadelphia & R. R. Co.

Before ACHESON, Circuit Judge, and KIRKPATRICK and BRADFORD, District Judges.

ACHESON, Circuit Judge. It has been decided that, where a railroad company holds rolling stock under a car-trust lease, title thereto remaining in the lessor until the rental has paid the purchase price, the lessor is entitled to reasonable compensation as rental for the use of such rolling stock by the receiver of the railroad company, even though the cars are afterwards returned to the lessor. *Myer v. Car Co.*, 102 U. S. 1; *Kneeland v. Trust Co.*, 136 U. S. 89, 103, 10 Sup. Ct. 950; *Thomas v. Car Co.*, 149 U. S. 95, 112, 13 Sup. Ct. 824. The soundness of this doctrine as a general principle is not controverted by the appellees, nor is it denied by them that, if the appellant's case is within the rule, remuneration on the basis of mileage earnings, as here claimed, would be a fair compensation. It is, however, denied that the above stated rule is applicable here. The appellees earnestly contend that the receiver of the Pennsylvania, Poughkeepsie & Boston Railroad Company (Henry H. Kingston) adopted the car-trust contracts which subsisted between that company and the Central Car-Trust Company, the appellant, and that

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the receiver thereby assumed the payment of the future accruing installments of the purchase price of the cars. It is not alleged, and under the evidence it cannot be claimed, that the receiver thus adopted these contracts by any express undertaking. The acts of the receiver and the orders of the court which appointed him—the circuit court of the United States for the district of New Jersey—are relied on as showing such acceptance and adoption of the contracts.

Certainly, the receiver was not bound to adopt these car-trust contracts; and it is quite clear that he did not assume the liabilities of the railroad company thereunder simply by taking possession of the cars, and using them temporarily, under his order of appointment. *Oil Co. v.*

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Wilson, 142 U. S. 313, 322, 12 Sup. Ct. 235; *U. S. Trust Co. v. Wabash W. Ry. Co.*, 150 U. S. 287, 299, 14 Sup. Ct. 86. The receiver undoubtedly was entitled to a reasonable time to ascertain whether or not it would be profitable or desirable for him to assume the obligations of these contracts, and to elect whether he would adopt them, or reject them, and return the cars to the trust company. *Id.* This record discloses that the receiver himself never undertook to exercise in this matter any right of election he may have had. He acted altogether under orders of the court. He was appointed on February 17, 1891, and four days thereafter, on February 21st, he presented to the court a petition setting forth the facts with respect to these car-trust contracts, and in the succeeding month of March he filed two other petitions relating to the same general subject-matter. On April 7, 1891, the court, under the prayers of these petitions, or some of them, made an order authorizing the receiver to issue receiver's certificates to meet the car-trust lease warrant or rental note which fell due March 1, 1891, and the lease warrants or rental notes which should fall due each month thereafter up to and including November 1, 1891. In fulfillment of this order, the receiver and the Central Car-Trust Company, on April 15, 1891, en-

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tered into a written contract, whereby it was agreed that the receiver would pay, and the Car-Trust Company would accept as cash, receiver's certificates in payment of the lease warrants or rental notes from March 1 to November 1, 1891, inclusive; and this arrangement was carried out. In one of his said petitions the receiver represented to the court that he believed that after November 1, 1891, the net revenue in his hands would be sufficient to meet the subsequently maturing installments of the purchase price of the cars. Evidently, in this belief and expectation, the order of court for the issue of these receiver's certificates was made, and the contract of April 15th was entered into. The arrangement between the receiver and the Car-Trust Company which the court sanctioned was temporary and experimental. Under all the circumstances, then, we cannot regard these acts of the receiver and the orders of the court as an absolute adoption of the car-trust contracts. The order of court of April 7 and the contract of April 15, 1891, merely carried forward the car-trust contracts to November 1, 1891. After that date the receiver's relation to these contracts was the same as when he was appointed. Now, the expectation that the net revenues of the railroad after November 1, 1891, would pay the after-accruing installments of the purchase price of the cars wholly failed of realization. Instead of a net surplus, there was a deficit, and on December 28, 1891, the receiver presented to the court a petition for authority to issue certificates to cover five additional monthly installments of car rental. The court held this application under advisement but it was never granted.

In this state of affairs, the receiver of the Pennsylvania, Poughkeepsie & Boston Railroad Company and the Philadelphia & Reading Railroad Company, under the sanction and order of the court, entered into the agreement of April 28, 1892. By the terms of that agreement the Philadelphia & Reading Railroad Company became the "agent and representative" of said receiver to con-

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duct "the operation of the line of railroad of the Pennsylvania, Poughkeepsie & Boston Railroad Company and its accessories and the traffic thereon," and the Philadelphia & Reading Railroad Company assumed and agreed to pay "all the expenses of the said operations" after May 1, 1892, "taking therefor the entire receipts and revenues to be derived from the said operations and traffic." The rolling stock held by the receiver (Kingston) under the car-trust contracts passed with the Pennsylvania, Poughkeepsie & Boston Railroad into the possession of the Philadelphia & Reading Railroad Company on May 1, 1892, and was retained and used by that company at first, and then by its receivers, until August 31, 1893, when by its election and notice the agreement of April 28, 1892, was terminated. The master has found that the Philadelphia & Reading Railroad Company took possession "of said equipment, and operated the same, with knowledge of the interest of the Central Car-Trust Company therein." It further appears that from May 1 to December 31, 1892, the Philadelphia & Reading Railroad Company paid monthly to the receiver of the Pennsylvania, Poughkeepsie & Boston Railroad Company mileage earnings made by this rolling stock upon the railroad of the latter company, and the said receiver paid the same over to the Central Car-Trust Company. The claim in dispute is for compensation on the basis of mileage earnings for the use of these cars by the Philadelphia & Reading Railroad Company and its receivers from January 1 to August 31, 1893. The capable master disallowed this claim, not without hesitation. His conclusion is thus stated in his report:

"Though with some doubt, arising from the failure of the parties to specifically express their intention as to any liability of the Philadelphia & Reading Railroad Company for any compensation for the use of this equipment upon the Pennsylvania, Poughkeepsie & Boston Railroad, I do not think that the Philadelphia & Reading Railroad Company, or its receivers, are

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liable for such compensation to Mr. Kingston, receiver, or to the Central Car-Trust Company."

We are unable to concur in this view. The Philadelphia & Reading Railroad Company took possession of this rolling stock knowing of the appellant's interest therein. It is not to be doubted that the company acted with the fullest knowledge of the facts. At any rate, inquiry was its plain duty. Now, certain it is that, as against the appellant, the company took no greater rights in this leased rolling stock than those of Mr. Kingston, the receiver. As the receiver could not use these cars without making reasonable compensation to the owner, neither could his representative, the Philadelphia & Reading Railroad Company. Then the latter company stipulated to pay all "the expenses of the said operations." We agree with the master that the term "operating expenses" does not embrace the "lease warrants,"—the unpaid installments of the purchase price of the cars. But we think it clear that the stipulation does cover the reasonable compensation to which the owner of these cars was entitled for the use of them, whether such use was by the receiver himself or by his agent and representative. This expenditure was part of the operating expenses. Under the circumstances it must have been within the contemplation of both the parties to the agreement of April 28, 1892, that the Philadelphia & Reading Railroad Company should pay the compensation for the use by it of this rolling stock, for Mr. Kingston, the receiver, turned over the whole railroad property he held under his receivership to that company, and that company was to receive the entire revenue. Finally, if there could be any doubt upon the face of the agreement as to the liability of the Philadelphia & Reading Railroad Company, that doubt was resolved against the company by what the parties did under the agreement from month to month from May 1 to December 31, 1892. Their long course of dealing with respect to mileage earnings definitely fixed the meaning of the

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agreement in accordance with the appellant's contention.

We have not at all overlooked the allegation now made of a mistake of fact running through all the monthly settlements. In explaining the supposed error, the comptroller of the Philadelphia & Reading Railroad Company in his testimony states that "it is very unusual for any road to report mileage of its own cars on its own road, and, they being Pennsylvania, Poughkeepsie & Boston cars, it did not occur to me that the clerk, in making up the mileage account, included the movements of those cars on their own road." These cars, however, did not belong to the Pennsylvania, Poughkeepsie & Boston Railroad Company, as the comptroller here erroneously assumes, but they were the cars of the Central Car-Trust Company, and that company, as we have seen, is entitled to reasonable compensation for their use, whether such use was by the receiver or by his representative. The allegation of mistake in the monthly settlements rests upon a misapprehension as to the rights of the parties. The decree of the circuit court is reversed, and the cause is remanded to that court, with direction to enter a decree in favor of the Central Car-Trust Company.

NOTE.

Receivers—Assumption of Lease of Rolling Stock—Liability for Rental.—Where a railroad company holds rolling stock under lease, title thereto remaining in the lessor until the rental has paid the purchase price, the lessor is entitled to reasonable compensation as rental for the use of such rolling stock by the receiver, even though the cars are afterwards returned to the lessor. *Kneeland v. American Loan & Trust Co.*, 43 Am. & Eng. R. Cas. 519, 136 U. S. 89.

Although in proceedings to foreclose a railroad mortgage, and to adjust the claims of intervening creditors, leases of cars by the car company, to a mortgagor company, both of which companies were dominated by substantially the same persons, the leases may be rejected as a basis for ascertaining the amount due the car company for the use of the cars, or the nature of the obligations assumed by the railroad company, or by the receiver appointed, pending such foreclosure, yet the lessor company is entitled to such reasonable rent as it could obtain in the open market for similar cars to be

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used in the same manner. *Thomas v. Peoria & R. I. R. Co.*, 36 Am. & Eng. R. Cas. 381, 36 Fed. Rep. 808.

Where receivers are directed to take charge of all the property of the company, including leased cars, and they take charge of certain leased sleeping cars, with full knowledge of the lease and of the rent agreed to be paid by the company and other obligations assumed, they become the assignees of the company and are bound by the contract. *Easton v. Houston & T. C. R. Co.*, 38 Fed. Rep. 784. See also *Meyer v. Western Car Co.*, 102 U. S. 1.

FLAHERTY

v.

HARRISON.

(*Supreme Court of Wisconsin, March 1, 1898.*)

Street Railways—Accident at Crossing—Signals—Frightening Teams—Negligence—Conflict in Evidence—Question for Jury.*—It appeared from the evidence that plaintiff drove his team near defendant's street car tracks within a few feet of an approaching car, his view of the car having been obstructed; that the motorman instantly signaled for a clear track; that plaintiff's horses took fright and caused a collision; that the motorman was not chargeable with notice of the danger of the horses becoming frightened at the car and its signals; and that the car could not have been stopped in time to avoid the accident. *Held*, that a verdict should have been directed for defendant, as requested, plaintiff's testimony as to negligence on the part of the motorman, contradicted by all the other evidence and by all reasonable probabilities from established facts, being insufficient to create a conflict in evidence which would warrant the submission of the question to the jury.

APPEAL by defendant from Ashland county circuit court. *Reversed.*

Action to recover damages for personal injuries. The complaint is to the effect that plaintiff approached defendant's street-car track, located on Second street, in the city of Ashland, Wis., from the south, traveling on a cross street known as "Ninth Avenue West"; that he was riding in a wagon, driving a team hitched

*As to Frightening Horses, see *Weil v. St. Louis S. W. Ry. Co.* (Ark.), 9 Am. & Eng. R. Cas., N. S., 721, and *notes*. p. 724.

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thereto; that at the intersection of the streets there was a building on one side and a high bill board on the other, which so obstructed his view that he could not see an approaching car till he was near the track; that the track was about 26 feet from the street line; that as he was passing over the track, his horses walking at a rapid rate of speed, a car coming from the west at a great rate of speed, without the motorman giving any signal of its approach by sounding the car bell, struck the wagon, and turned it over, throwing the plaintiff out against a curbstone and telephone pole, causing the injuries for which the damages are claimed.

Looking at the evidence in the most favorable light for plaintiff, it is to the following effect: Plaintiff approached the track as alleged. The obstructions to his view existed as claimed. Plaintiff was standing up in his wagon. When the horses' heads were just over the track, plaintiff saw a car approaching from the west. The motorman, at that instant, immediately signaled for a clear track by vigorously sounding his bell. Plaintiff immediately backed his team clear of the track, and then stopped with the horses under complete control. In backing, the team swung a little to the right so as to stand somewhat diagonally to the track. As the car reached a point nearly opposite where the horses stood, they became frightened by the sound of the bell and the noise and appearance of the car, causing plaintiff to lose control of them, whereupon they jumped forward, onto and partially across the track so as to place the wagon in the pathway of the car. The car instantly struck the wagon near the front end, at which instant plaintiff fell over the side of the wagon box towards the car and let go the lines. Instead of falling to the ground, he caught hold of the wagon box and hung onto it, with his body outside. The horses ran away diagonally across the track and down the street, with plaintiff hanging to the box, and as the hind part of the wagon crossed the track the car collided with it at a point about 30 or 40 feet from the first collision. After the horses ran about 100 feet

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they passed near a telephone pole on the left-hand side of the street so that plaintiff's body collided with the pole, forcing him to lose his hold on the box and fall to the ground. The evidence is undisputed that plaintiff sustained some injuries, and that neither the wagon nor the car was injured, or showed any evidence of the collision. There is some conflict in the evidence as to the speed of the car, but looking at that in the most favorable light for plaintiff, it is to the effect that if the car was going at the rate of about 8 miles an hour, it would not have been practicable to have stopped it inside of about 50 feet, and that it actually did stop in going from 30 to 40 feet after the car first struck the wagon.

At the close of the evidence there was a motion on the part of the defendant for the direction of a verdict, which was denied, and the ruling duly excepted to. A verdict on the evidence was rendered in plaintiff's favor. There was a motion to set the verdict aside as contrary to the evidence, and for a new trial, which was denied. Judgment was rendered in plaintiff's favor on the verdict, from which this appeal was taken.

Tompkins & Merrill, for appellant.

Cate, Sanborn, Lamoreux & Park, for respondent.

MARSHALL, J. (after stating the facts). The question for decision on this appeal is: Does the evidence warrant the verdict and the judgment, under the rule that, if there is any credible evidence in that regard, which, if believed, is sufficient therefor, the ruling of the trial court, refusing to grant a new trial for insufficiency of evidence, will not be disturbed on appeal?

It is apparent at the outset that there was an entire failure to establish the facts pleaded to show actionable negligence. While it is alleged that plaintiff was driving his team across the street-railway track at the time of the injury, the evidence shows that the team became unmanageable while standing in a safe position, and jumped forward across the track immediately ahead of the car, so that it was impracticable to stop

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the car after the team started. The complaint states that the plaintiff proceeded onto the track without observing the coming car, because the motorman failed to signal the approach by sounding his car bell. The evidence shows that the motorman sounded the car bell constantly while passing over a distance of about 100 feet in approaching the crossing, and the negligence relied on to support the verdict is not failure to sound the bell, but sounding it too much, as the car approached the crossing, so that the noise of the bell, concurring with the noise and appearance of the rapidly approaching car, frightened the team and caused them to become unmanageable and jump onto the track. There is not a scintilla of evidence that the horses, by their appearance, indicated danger of their running away or becoming unmanageable on account of the approach of the car and the noises incident thereto, up to the very time they became unmanageable and jumped forward. Aside from the evidence of plaintiff that the car was going at a speed of 20 miles an hour, there is no fact alleged in the complaint showing negligence, that is supported by evidence, and it cannot be said that plaintiff's testimony as to the speed of the car was credible in the face of the undisputed evidence that neither the car nor the wagon was injured, or showed any evidence of the collision, and that the car was stopped as soon as practicable after the collision if it was going at an ordinary rate of speed. Where all reasonable probabilities from facts unquestionably established by the evidence are on one side of a controversy, the testimony of an interested party to the contrary does not create a conflict of evidence requiring such controversy to be submitted to and determined by a jury, or, if submitted, support their determination, if contrary to all such reasonable probabilities. *Badger v. Cotton Mills*, 95 Wis. 599, 70 N. W. 687.

It follows that there was no evidence to warrant a jury in finding that the car was going at a negligent rate of speed as it approached the crossing, or for submitting that question to a jury. Further, in face of the

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claim of negligence in the complaint that the motorman ran the car into plaintiff's wagon and overturned it, without giving any signal of the approach of the car, there was no warrant for submitting the case to the jury on the claim that there was a negligent ringing of the car bell which caused the horses to become frightened and unmanageable, especially when there was no evidence that the horses showed symptoms of fright till the instant they jumped ahead of the car.

Looking at the case in the light of the pleadings and the evidence, it is considered that there was no evidence that the motorman was negligent, and certainly no evidence of actionable negligence, in that there was no room for a reasonable inference from the evidence and circumstances, established thereby, that the jumping forward of the team was a natural and probable result of the conduct of the motorman, and that, as a person of ordinary intelligence and prudence, in the light of attending circumstances, he ought reasonably to have anticipated such result, or some injury to plaintiff by reason of such conduct. *Deisenrieter v. Malting Co.* (Wis.) 72 N. W. 735. Before that essential test of actionable negligence, the plaintiff's case seems to fail so completely as to lead to the conclusion that it was entirely overlooked by the trial court. The case of *Eastwood v. Railway Co.*, 94 Wis. 163. 68 N. W. 651, is a far stronger case to sustain a claim of actionable negligence than the one before us, and this court there decided that no such negligence was disclosed by the evidence. The circumstances were that the horses and conveyance were in a place of safety as the car approached; that though exhibiting some evidence of uneasiness, they were under the control of the driver till just as the car was passing them. They then suddenly jumped around and backed the sleigh onto the track, causing the injury complained of. There was no interval between the instant of the backing of the horses and the collision, sufficient to stop the car. The claim was made that the motorman should have observed the uneasiness of the horses and

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applied the brake to the car so as to control its motion with reference to any danger that existed of the horses' placing themselves or the sleigh in the path. In deciding the case the court, by MR. JUSTICE WINSLOW, said, in substance, that a motorman is not required to apply the brakes whenever he sees a horse in the street, along the track, showing some symptoms of apprehension; to demand that a street car must be slowed up or stopped every time a horse or a team displays signs of uneasiness, would render it impossible for street-car companies to perform their duty to the public by furnishing speedy transportation to passengers. All that was said in the opinion on the line indicated applies most strongly to the facts of this case, because there is no evidence here of the fright of the team till the instant they jumped onto the track, and the plaintiff testified that they were under his control till that instant. The ruling in *Bishop v. Railway Co.*, 92 Wis. 139, 65 N. W. 733, is also decisive of this case, though the facts there do not make its application quite as well defined as that of *Eastwood v. Railway Co.*, *supra*.

It follows from the foregoing that the defendant's motion, made at the close of the evidence, for the direction of a verdict, should have been granted, and that the motion to set aside the verdict as contrary to the evidence should have been granted.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

Paterson, &c., R. Co. v. Mayor of Newark

PATERSON, N. & N. Y. R. Co. *et al.*

v.

MAYOR, ETC., OF CITY OF NEWARK.

(*Supreme Court of New Jersey, Nov. 8, 1897.*)

Construction of Street Across Right of Way—Compensation.*— The laying out of a highway across a railroad is a taking of the company's property for public use, and entitles it to compensation therefor; and compensation for such taking includes the making good to the company the moneys expended by it in erecting, maintaining, and operating gates at the crossing, provided such gates are necessary for the proper protection of the public, and for the safe operation of the company's railroad.

Same—Measure of Damages.—Where a city, which is engaged in acquiring by condemnation the right to lay out and open a street across the tracks of a railroad company, fails to define the manner of crossing, but seeks to condemn the privilege of crossing generally, the damages will be assessed for that manner of crossing which will be most injurious to the company's interests.

(Syllabus by the Court.)

Argued June term, 1897, before MAGIE, C. J., and DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Cortlandt Parker and *Cortlandt Parker, Jr.*, for appellants.

Frederick T. Johnson, for respondents.

GUMMERE, J. The city of Newark instituted condemnation proceedings for the purpose of acquiring the right to cross the railroad of the Paterson & Newark Railroad Company with a newly laid out street, called "Herbert Place." The railroad company, being dissatisfied with the award of the commissioners rendered in those proceedings, appealed therefrom to the circuit court of the county of Essex. On the trial of that appeal the court refused to permit evidence to be given by the company of the cost of constructing, maintaining, and operating safety

*See *Chicago, M. & St. P. Ry. Co. v. City of Milwaukee* (Wis.), *ante*, p. 537 and *note*, p. 554.

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gates at the proposed crossing, and limited the damages of the company to the cost of construction and maintenance of the crossing, planking, and cattle guards. The appellants contend that there was error in this judicial action, and that on account thereof a new trial of the appeal should be directed. The contention of the appellants is well founded. Our constitution declares that private property shall not be taken for public use without just compensation, and nothing is just compensation that does not make good to the owner all the pecuniary outlay which he is compelled to make by reason of the appropriation of his property. If the construction of a high-way across its road makes it necessary for a railroad company, on account of the populousness of the neighborhood, or for any other reason, to erect, maintain, and operate safety gates for the proper protection of the public, and the safe operation of its road, the outlay for this purpose is just as much a damage caused by the taking of the company's land as is the cost of planking between the tracks, or of constructing cattle guards, and the company is equally entitled to compensation therefor. Whether or not the company is entitled to compensation for such outlay depends upon whether it is rendered necessary by the laying out of the street across the company's railroad, and this is a question for the jury to decide; and, if the jury is satisfied from the evidence that such outlay is necessary for the proper protection of the company and the public, it should be included in their verdict. It is said, in opposition to this view, that the appellants ought not to be allowed to recover for the cost of constructing, maintaining, and operating safety gates, because its obligation to do so results from an ordinance of the city of Newark which requires all railroad crossings to be so protected; that this ordinance is a public regulation, pure and simple, which may be abolished tomorrow; and that it is entirely settled that no person can recover damages on account of being compelled to comply with the police regulations of a municipality, which are designed to

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promote the common welfare. But this agreement, as it seems to me, is based upon a misapprehension of fact. The necessity for gates at a highway crossing over a railroad does not at all depend upon the existence or nonexistence of an ordinance requiring their erection; for, unless the proper protection of the public makes them necessary, such an ordinance would be unreasonable, and therefore void, and, on the other hand, if the safety of the public and the safe operation of its road required the presence of gates at such crossing, it would be necessary for the company, for its own protection, to erect them, even if no ordinance to that effect existed. And in this case the question which should have been left to the jury is, not whether a compliance with the city ordinance required the appellants to construct, maintain, and operate gates, but whether the proper protection of the public, and the safe operation of their road, made it necessary for them to do so. The existence of an ordinance requiring it to be done is only important, in the determination of that question, as being an admission on the part of the city that such gates are necessary to the public safety.

It is further argued, on the part of the respondents, that the ruling of the trial court in excluding evidence of the cost of constructing and operating gates was justified by reason of the fact that the grade of the proposed street had not yet been fixed, and that until that was done there was no presumption that the crossing would be at grade, rather than overhead or undergrade, and that, therefore, there was nothing to warrant the conclusion that safety gates would be required. But this contention overlooks the well-settled rule that where the condemning party fails to define how it will cross the right of way of a railroad company, but seeks to condemn the privilege of crossing generally, the damages will be assessed for that manner of crossing which will be most injurious to the company's interests. *National Docks & N. J. J. C. Ry. Co. v. United Cos.*, 53 N. J. Law, 217, 21 Atl. 570. The rule to show cause should be made absolute, and a new trial ordered.

Same—Measure of
Damages.

Western N. Y. & P. R. Co. *v.* Venango County

WESTERN NEW YORK AND PENNSYLVANIA R. CO.

v.

VENANGO COUNTY *et al.*

(*Supreme Court of Pennsylvania, Jan. 3, 1898.*)

Taxation—Railroad's Repair Shop.*—A railroad company's machine shop, used exclusively by it for its own repairs, which are reasonably necessary to the successful prosecution of its business, is not subject to taxation, under the laws of Pennsylvania, by the local authorities.

APPEAL by defendants from superior court. *Affirmed.*

William H. Forbes, for appellants.

Isaac Ash, Frank Rumsey, and P. M. Speer, for appellee.

WILLIAMS, J. Is a machine shop belonging to a railroad company, and used exclusively for repairs in its own business, subject to taxation by the local authorities? This must depend upon the answer to the question whether such repairs are reasonably necessary to the successful prosecution of the business of the railroad company. If the shop is for the original construction of locomotives or cars, it is, under all our cases, subject to local taxation. A manufactory is no necessary part of the equipment of a carrying company, whether the carriage is conducted upon land or by water. Nor can a corporation engage in any other line of business than that which its charter and the general law under which it was granted authorizes. It may do the work for which it was created with as efficient and useful methods as it can command, and its preparations to serve the public and compete with its rivals are within its corporate powers, and are,

*See note at end of case.

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therefore, covered by the taxation to which the state subjects its corporations. The application of this rule has in the main been uniform and consistent. It was stated with clearness and force in *Lehigh Coal & Nav. Co. v. Northampton Co.*, 8 Watts & S. 334, in which we held that the "bed, firm bank, and towpath of an incorporated canal are not taxable as land, * * * nor are the toll houses and collectors' offices belonging to it and incident thereto." The reason given was that these were a necessary part of the canal itself, without which its business could not be properly carried on. Freight and passenger depots upon the line of a railroad were considered in *Northampton Co. v. Lehigh Coal & Nav. Co.*, 75 Pa. St. 461. It would be possible to discharge passengers and freight into the streets, and so dispense with such structures; yet we held that they were reasonably necessary to the business of the railroad company, and constituted a part of its corporate machinery properly employed by it as incident to its carrying trade. They were, therefore, not taxable by the local authorities. This rule was held in *Railroad Co. v. McLenahan*, 57 Pa. St. 29, to include all buildings required for and in use by the company in its ordinary operations, such as water stations, toll houses, watch houses, oil houses, and "whatever buildings, without which the railroad would not be a complete and perfect railroad." The same test is applied impartially to other corporations. In *Wayne Co. Com'rs v. Delaware & H. Canal Co.*, 15 Pa. St. 351, it was applied to a water company, and its reservoir held to be protected from local taxation as real estate. In *West Chester Gas Co. v. Chester Co.*, 30 Pa. St. 232, it was applied to a gas company. In *Lackawanna Iron & Coal Co. v. Luzerne Co.*, 42 Pa. St. 424, to a corporation engaged in making and manufacturing iron. In the latter case we said: "The public works of corporations, used as such, with their necessary appurtenances, are exempt from taxation; but all the property owned by them, whether real or personal, is liable to assessment and taxation."

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The application of this rule to the case now before us requires us to affirm the judgment of the superior court for the reason that repairs are reasonably necessary as an incident to the business of the plaintiff company. New cars are merchandise, and can be bought in the market as they may be wanted. Locomotives may be obtained in the same manner, just as the need for them becomes apparent. But the almost infinite variety of breakage due to constant wear and to the power required for the movement of cars, makes it necessary for a railroad company to maintain shops at convenient places along its line, with an adequate force of men and tools to mend and make fit for continual service all its appliances of transportation with the least possible delay. Many repairs can be made, if only the mechanics, with their tools, are at hand, in so short a time as not seriously to delay the movement of the cars on which they are needed; while serious delays would be the necessary result of detaching them, and sending them to some general repair shop, where they would be compelled to wait their turn for the attention needed, if such a system was compulsory upon the company. Current repairs we hold to be one of the necessities of the business of transporting passengers and freight. A shop in which such repairs are made is reasonably necessary as part of the corporate equipment of the carrying company, and cannot be taxed as real estate by the local authorities. It is thought that the Case of *East Pennsylvania R. Co., 1 Walk. (Pa.) 428*, is authority for a contrary doctrine. In that case the local authorities had assessed with taxes a three-story brick building at the corner of Sixth and Walnut streets, in the city of Reading. This was several squares away from the railroad of the company, and had no connection with its track or railroad property. The president of the company resided with his family in the building, and had his office there. Some other of the general offices of the company were located in the same building. The company defended against the payment of the taxes by setting up the rule adopted in *8 Watts & S.*

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334, and alleging that the use of the building, wherever it might be located, made it a part of the "public works" of the company. We did not take that view of the question, but held that the building, having no connection with the defendant's road, was no more a necessary appurtenant to it than any other house in the city of Reading would be if the company chose to rent and occupy it by its officers or employes. The company might prefer to occupy one building rather than another, or find one more convenient than another, but neither preference nor convenience is the test. It is necessity reasonably regarded with reference to the purposes for which the corporation was organized. So far the East Pennsylvania R. Co. Case was rightly decided. But the county of Berks appealed from the same judgment, and the cross appeal was heard, decided, and reported with the appeal of the East Pennsylvania R. Co. *supra*. In the latter case it was held, upon the facts as then before the court, that the repair shop and blacksmith's shop in use by the company in its own business, and neither engaged in construction nor in custom work, was subject to local taxation. This case derives no support from the cases preceding it, nor has it, upon this particular point, been followed by the later ones. On the contrary, the distinction between construction and repair has been generally recognized. In *Railroad Co. v. Vandyke*, 137 Pa. St. 249, 20 Atl. 653, the shops operated by the company were held liable to local taxation because they were maintained "for the construction and repair of its locomotives and cars." The fact that they were used for construction made them liable, notwithstanding repairs might also have been made at them. This distinction seems to us to rest on principle as well as on the authority of our own cases. The business a corporation may lawfully do must be defined by its charter. If it is to supply a municipality with water or gas, its implied or incidental powers must be such as are reasonably necessary to the proper performance of its functions as a water or a gas company. It cannot manufacture pipe, because it may need to use

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pipe in the distribution of water or of gas. It cannot engage in the manufacture of plumbers' supplies, because it might be profitable to be able to supply its customers with such goods. Its business is one,—the supply of water or gas, as it may be, to its customers,—and to this it must devote its attention and confine its operations. It is precisely the same with a railroad company. It is given great privileges and franchises to enable it to build and operate a line of railroad for the public convenience and its own private profit. It must devote itself to the business for which the state has created it and clothed it with its powers and privileges. It may not embark in the mining of coal without leave. It may not engage in the business of making and manufacturing iron and steel, or in the production of textile fabrics, or in the establishment of commercial houses. or any other business enterprise not incident to, and reasonably necessary for, the successful running of a railroad. It may improve its road to any extent that it is practicable to do. It may avail itself of the best-known equipments and adjuncts so long as they are equipments and adjuncts only, and make its road as nearly perfect as it may be able. It may provide the best-known machinery and the means for keeping it as nearly as possible in constant order and repair, but here is the exterior limit of its appropriate field of operations. It may buy the best rails and cars and engines the manufacturing establishments of the world can offer. It may operate them with the highest skill it can command. It may employ all necessary mechanical talent to keep its road and its rolling stock in the best possible state of repair, and to offer the public the greatest efficiency and safety attainable in its business. This is the legitimate province of a railroad company, and within it is ample room for the employment of its capital, and for the exercise of the highest administrative powers within its reach. With this province it must be content. If it steps over its boundary, local taxation is among the penalties which it incurs, and which it ought to be ready to submit to

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without protest. The judgment of the superior court is affirmed for the reasons now given. The case reported in 1 Walk. (Pa.) is distinctly overruled so far as it is in conflict with the rule laid down in the foregoing opinion.

NOTE.

Taxation—Shops.—Shops owned and operated by a company for the construction and repair of its locomotives and cars are liable to taxation for local purposes as real estate, even though they have no greater capacity than is required for the work the company itself has them to do. *Pennsylvania & N. Y. C. & R. Co. v. Vandyke*, 137 Pa. St. 249, 20 Atl. Rep. 653.

A roundhouse of a railroad company was assessed by the local assessor, and the railway company claimed that it had listed the same with the state board, which had levied taxes thereon that it had paid, but the proof failed to show whether, or to what extent, the roundhouse was also used as a repair shop. *Held*, that, unless it was also used as a repair shop, so as to make it such shop as well as a roundhouse, the assessment should have been made by the state board, and not by the local assessor. *Red Willow County v. Chicago B. & Q. R. Co.*, 39 Am. & Eng. R. Cas. 556, 26 Neb. 660.

Where machinery and repair shops are situated upon lands other than the right of way, but are connected with the main line of the railroad by side tracks, they should, under sect. 1463, Rev. St. Idaho, be assessed by the local assessor rather than by the Territorial board of Equalization. *Oregon Short Line R. Co. v. Yeates*, (Idaho) 33 Am. & Eng. R. Cas. 481, 17 Pac. Rep. 457.

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(*Supreme Court of North Dakota, Jan. 31, 1898.*)

Railroads—Land Grants—Taxation.*—The decision of this court in *Jackson v. La Moure Co.*, 46 N. W. 449, 1 N. D. 238, and *Grandin v. La Bar*, 57 N. W. 241, 3 N. D. 446, followed on the question of the taxability of indemnity lands of the Northern Pacific Railroad Company before the selection thereof has been approved by the secretary of the interior. Before that time such lands are not taxable.

Same—Place Lands.—Place lands are taxable after they have been surveyed in the field, although the plat of survey has not yet

*See notes at end of case.

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been filed in the local land office; the survey made being thereafter approved as made, and the plat thereof being duly filed in such office.

Same—Validity of Levy.—In a proceeding to obtain a tax judgment under chapter 67 of the Laws of 1897, the failure of the county board of equalization to meet at all is not fatal to the tax, for the reason that the act gives the taxpayer a full hearing, in the very proceeding to enforce the tax, as to the fairness of the assessment and the justice of the tax, and confers upon the court the power to reduce the tax if, on such hearing, it appears that the land has been partially, unfairly, or unequally assessed.

Same.—So far as matters of form are concerned, that act is a curative law in all cases in which the defects in the tax proceeding have not prejudiced the taxpayer.

Same—Province of Courts.—When, however, there is no assessment or levy, no tax judgment can be rendered. The act does not vest in the courts the power to assess property or levy taxes, but merely provides the machinery for enforcing and sustaining taxes.

Same—Void Levy.—The taxes for 1890, having been assessed by percentages instead of in specific amounts, as required by the act of 1890, are void, and no tax judgments thereon can be rendered in this proceeding. BARTHOLOMEW, J., dissenting.

Same—Validity of Levy.—It will not defeat a tax that one of the items of levy of taxes for general county purposes was stated to be "miscellaneous expenses."

Same—Tax Liens—Limitations.—A tax lien on real estate being declared to be perpetual, no lapse of time will bar a remedy to enforce such lien against the land. It follows that no limitation statute can be invoked as a defense to a proceeding, under the law of 1897, to foreclose a tax lien.

Same—Penalties—Delinquent Taxes.—Certain questions decided relating to penalties and interest on taxes levied prior to the act of 1890, and also on taxes levied subsequently to that act, but prior to the time when the Revised Codes took effect.

Same—Illegal Taxation.—Following the decision of the federal supreme court in *McHenry v. Alford* (decided Jan. 3, 1898, and not yet officially reported) 18 Sup. Ct. 242, *held*, that the taxes against the land grant of the Northern Pacific Railroad Company, assessed in 1887 and 1888, are illegal, and hence that no tax judgments therefor can be rendered.

(Syllabus by the Court.)

PROCEEDING by Wells county against Edwin H. McHenry and Frank G. Bigelow, receivers of the Northern Pacific Railroad Company, to enforce payment of taxes, assessed upon corporate property. Judgment was rendered for plaintiff, and certain questions are certified here by the trial court. Judgment modified.

J. E. Robinson and J. J. Youngblood, for plaintiff.

Ball, Watson, & Maclay, James B. Kerr, and J. B. McNamee, for defendants.

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CORLISS, C. J. The record in this proceeding is certified to us by the district court without an appeal, under the provisions of section 10, c. 67, Laws 1897.

Case Stated. The proper steps having been taken under this statute to obtain tax judgments against

lands owned by the Northern Pacific Railroad Company, the defendants, who are receivers of such company, filed their answers, setting up various defenses, which will be more specifically referred to as the points certified to us for decision are severally discussed. Some of the lands are indemnity lands. They were selected by the company, in manner and form as prescribed by the secretary of the interior, prior to the levy of the taxes in question. But it appears that the selection was not approved by the secretary of the interior until May 25, 1896. While the facts of this

Railroads—Land Grants—Taxation. case are different from the facts in Jackson *v.* La Moure Co., 1 N. D. 238, 46 N. W. 449, and Grandin *v.* La Bar, 3 N. D. 446, 57 N. W. 241, in that the selection has, in the case at bar, finally been approved, yet the principle of those cases must govern this. The groundwork of those decisions was that an approval of the secretary of the interior was necessary to vest in the company title of any kind, either legal or equitable. If such approval is the act which transfers the title, it is evident that it is immaterial whether the approval be absolutely refused or withheld or subsequently given. In all cases, whatever action the secretary of the interior takes, the whole title to the property, legal and equitable, remains in the government until he has passed upon the various questions which must be settled before it can be known whether such selection should be assented to by the government or modified or wholly disapproved. When we construed the words “under the direction of the secretary of the interior,” in the act containing the grant of the Northern Pacific Railroad Company, as equivalent to the language used in the Price County Case, 133 U. S. 496, 10 Sup. Ct. 341, we took ground which made it necessary for us to hold, under the

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ruling of the federal supreme court in that case, that the Northern Pacific Railroad Company is, as to indemnity lands selected by it, a stranger to the title, and has no taxable interest therein until such selection is approved. The fact that the secretary of the interior has approved the selection, made in 1886, of the land in this case taxed as indemnity land, does not give the company, as of the date of such selection, any greater right therein than it would have had if the approval had been withheld. Unlike place lands, the title to indemnity lands does not vest in the company as of the date of the act of congress containing the grant, but only from the time of the selection thereof; and until the selection is approved there is no selection in fact, but only preliminary steps, which may or may not result in a selection, according to the subsequent action which the proper representative of the government may take in the matter of such selection. This is the explicit declaration of the federal supreme court in the Price County Case, and, so long as the opinion in that case stands unmodified, we consider it our duty to hold that until approval no title whatever to indemnity lands vests in the Northern Pacific Railroad Company. In the Price County Case the court said that, "until the selections were approved, there were no selections in fact, only preliminary proceedings taken for that purpose, and the indemnity lands remained unaffected in their title." It follows that we must answer in the negative the following question certified to us by the district court: "Should not judgment be given against indemnity lands for all taxes charged against the same, with interest and penalty as provided by law?"

It is urged that some of the lands within the place limits were not surveyed until after the taxes for the year 1892 had been levied, and that, therefore, such taxes are illegal, so far as they affect such lands. The basis of this claim is the fact that while the survey in the field antedated the assessing and levying of the taxes, yet the plat of the survey was not filed in the

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land office until after such levy had been made. Counsel for the receivers cite in this connection the following cases: U. S. v. Curtner, 38 Fed. 1; Frasher v. O'Connor, 115 U. S. 102, 5 Sup. Ct. 1141; McCreery v. Haskell, 119 U. S. 327, 7 Sup. Ct. 176; Barnard v. Ashley, 18 How. 42; and also the ruling of Secretary Schurtz in the case of *In re Foster*, 5 Copp. Landowner, 5. They insist that these decisions establish the rule that a survey is not complete until after the plat is filed in the proper office. As we regard the matter, these cases have no bearing on the point now under discussion. It is undisputed that the survey as made in the field was the survey which was in fact approved, and that the plat which was subsequently filed was in fact the plat of such survey. The lands being within the place limits, the grant, as soon as it attached on the filing of the plat (assuming that it did not attach before) related back to the date of the act containing the grant to the Northern Pacific Railroad Company. The grant as to place lands is a grant *in præsenti*, and when it attaches it becomes a grant of the land from the very day the act took effect. See *Jackson v. LaMoure Co.*, 1 N. D. 238, 46 N. W. 449, and cases cited. It therefore appears in this case that the company was the owner of the land when it was assessed and when the tax was levied. Such land having been at that time surveyed in the field, the assessor could value it, for its boundaries were then established just as they now exist and ever since have existed.

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But it is insisted that this land was not taxable because the survey fees had not been paid. In this connection counsel for the receivers cite the *Rockne Case*, 115 U. S. 600, 6 Sup. Ct. 201. The act of congress which modified the rule laid down in that case was qualified by the proviso that it should not apply to unsurveyed lands. If these lands were at the time they were assessed unsurveyed, within the meaning of that statute, it is clear that they could not be taxed. *Railroad Co. v. McGinnis*, 4 N. D. 494, 61 N. W. 1032.

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The cases cited throw no light upon the question as to the meaning of the word "unsurveyed" as used in the act of 1886. That statute had for its object the abrogation of an unjust rule that the railroad company could, under the guise of protecting the lien of the government (and to protect such lien no such ruling was necessary), interpose as a defense to state taxation its own failure to discharge its obligation to the federal government. The extraordinary spectacle was presented of a recipient of governmental bounty escaping one just obligation to the state because it had failed to discharge another obligation to the general government. The statute, passed to wipe out such an inequitable rule, should be given a liberal construction,—one which will carry out the purpose of congress to compel the company to pay taxes when they are justly due. On this ground we hold that the lands mentioned were not unsurveyed lands, within the meaning of the proviso embodied in the act of 1886, after they had been surveyed in the field, although the plat of such survey had not at that time been filed. Such plat was in fact filed, and the survey as made was approved, without alteration. The objection is highly technical, and we do not deem it consonant with the spirit of the act of congress already referred to, to sustain such objection. We therefore answer in the affirmative the following question certified to us by the district court: "Were the odd-numbered sections in township 145 of ranges 71, 72, and 73 taxable for the year 1892, although the final plat of the survey was not filed in the United States land office until August 8, 1892, the levy of the county taxes having been made on July 15, 1892, and although the survey fees were not paid until May 27, 1892, it being conceded that the lands were surveyed in the field prior to said levy?"

One of the defenses is that the taxes levied in the year 1889 are void because the county board of equalization failed to meet as required by law, and our decision in *Power v. Larabee*, 3 N. D. 502, 57 N. W. 789, is cited to support the claim that this omission rendered illegal the entire

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tax levied for that year. The ground of this contention is the denial of the citizen's constitutional right to a hearing on the question of valuation. We do not wish to qualify anything said by this court in that case. A hearing is vital in tax proceedings based on valuation. In *Power v. Larabee* no hearing in court was granted by statute. In this respect that case differs from the case at bar. The legislature having designated a certain tribunal to pass on the question of just apportionment of the tax on the basis of value, we held that no court had authority to exercise such a function. This must be the law, for it is not one of the inherent powers of a court of justice to participate in any way in the levy of a tax. Such power is usually lodged in administering officers and boards. In the absence of statutory permission, no court has jurisdiction to review the action of an assessing officer in the valuation of property for purposes of taxation, where the only claim is that the assessing officer erred in judgment as to such valuation. Of course, in case of fraud, a different question would be presented. But we are not aware of any principle of law which prevents the legislature from vesting in the ordinary courts of justice the duty of revising the action of assessors whenever their valuation of property is challenged by the citizen, or even the power to act as equalizing boards before which all assessments shall be brought for revision prior to their becoming final. We doubt the expediency of any legislation which should vest all the powers of boards of equalization in the ordinary judicial tribunals. Local boards are better qualified to exercise such functions. And the imposition of such burdens upon the courts would seriously impair their efficiency in the discharge of those duties which are germane to the judicial branch of the government. These considerations, however, are for the legislature. With them the courts have naught to do. The question with which the judicial tribunals have to deal is one of power, and not of sound statesmanship.

We must now turn our attention to the statute, which

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it is urged satisfies the demand of the organic law that the citizen should be afforded an opportunity for a hearing before the value of his property, as the basis of the apportionment of a tax, shall be finally fixed. The act of 1897, providing the machinery for transmuting taxes into tax judgments, contains a curative feature as to past taxes. The effect of this law, with respect to taxes thereafter assessed, we need not now stop to consider, as no such taxes are before us. Section 9 of this act (chapter 67, Laws 1897) provides as follows: "If all the provisions of the law in force at the time of such assessment and levy in relation to the assessment and levy of taxes, shall have been complied with, of which the list so filed with the clerk shall be *prima facie* evidence, then judgment shall be rendered for such taxes and the interest, penalties and costs. But no omission of any of the things provided by law in relation to such assessment and levy or of anything required by an officer or officers to be done prior to the filing of the list with the clerk shall be a defense or objection to the taxes appearing on any piece or parcel of land, unless it be also made to appear to the court that such omission resulted to the prejudice of the party objecting, or that the taxes against such piece or parcel of land have been partially, unfairly or unequally assessed; and in such cases, but in no other, the court may reduce the amount of taxes upon such piece or parcel and give judgment accordingly. It shall always be a defense in such proceedings, when made to appear by answer and proof, that the taxes have been paid, or that the property is lawfully exempt from taxation." In construing this section we must not lose sight of the fundamental fact that it speaks of taxes, and that the object of this enactment is to provide the necessary machinery for putting a tax claim in judgment. A lien is to be fastened upon the land of a citizen by a tax judgment,—not for money loaned to the citizen by the public or on account of a breach of contract or the commission of a tort, but for a tax. The basis of the proceeding authorized by the

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statute is the ascertained obligation of the owner of the land to pay, on account of such ownership, a specified sum towards the maintenance of civil government. We think that there must be an assessment and levy to warrant a judgment under this statute. We do not believe that the legislature intended to vest in the courts the power of making the assessment or the levy. But, if there is an assessment and levy, we believe that all omissions in matters of form are cured by the act of 1897. It is true that section 9 of that act does not in terms cure omissions in tax proceedings which should come before the court under that act. But this is the legal effect of the law where the taxpayer cannot show prejudice, for all defenses based on such omissions are swept away as defenses, except when prejudice can be affirmatively shown by the taxpayer. When the legislature, in authorizing an action in court upon a tax, provides, in the same law, that omissions in the proceedings shall not constitute a defense to the tax, the necessary consequence of such legislation is to validate whatever has been done in the assessment and levy, notwithstanding omissions in matters of form, provided an assessment and levy are in fact made. The validity of curative statutes in relation to tax proceedings has been sustained by this court, and that such legislation is constitutional has become one of the elementary principles of law. See *Shattuck v. Smith* (N. D.), 69 N. W. 5. Barring the matter of the right to a hearing (for this cannot be dispensed with), the legislature may legalize any step or declare immaterial any omission in a tax proceeding, provided, of course, there is something which may be called an assessment and levy. If the officer authorized to make the assessment fails to make it, but the property is assessed by another, the act of the latter may be declared an assessment, provided he could have been authorized originally to make such assessment. In *Shattuck v. Smith* we hold that a levy made without any authority of law could be validated by a subsequent statute. But we would not wish to be under-

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stood as carrying this argument so far as to validate the equalization of an assessment by a board which did not possess authority to equalize it at the time of such equalization, for in such case the citizen would be denied a hearing, he having no notice and being under no obligation to assume that such board would exercise functions not then vested in it by law. If some body other than the county board of equalization had passed upon the assessment during the year when that board failed to meet, and the legislature had attempted to legalize such equalization, we would have before us a case widely different from the one we are actually discussing. The legislature has not attempted to declare that the taxpayer should have known that some then unauthorized body would hear and redress his grievance, but that in the very proceeding to determine the amount of the tax he should pay he may be heard in court as fully as he could have been heard had the proper board met at the proper time and listened to his complaint. The statute declares: "But no omission of any of the things provided by law in relation to such assessment and levy, or of anything required by an officer or officers to be done prior to the filing of the list with the clerk shall be a defense or objection to the taxes appearing on any piece or parcel of land unless it be also made to appear to the court that such omission resulted to the prejudice of the party objecting, or that the taxes against such piece or parcel of land have been partially, unfairly or unequally assessed, and in such cases, but in no other, the court may reduce the amount of taxes upon such piece or parcel and give judgment accordingly." It is obvious that the time of the hearing is unimportant. If at any period in the tax proceeding, or in the course of the judicial proceeding instituted to enforce the tax, the right to demonstrate that the tax against the land is excessive is granted by the statute, that protection which the constitution guaranties is fully enjoyed by the citizen. When the hearing shall be had, before what board, officer, or tribunal, what

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the procedure shall be, and, generally, all matters of detail, are wholly within the control of the legislature, provided the substance of the right be not impaired. Tax proceedings are summary in character. The public exigencies will not permit of the delays incident to ordinary proceedings in the courts of justice. The constitutional right to be heard in such proceedings must necessarily partake of the character thereof. Investigation need not be in a court of justice. It seldom is. The rigid rules of evidence which there obtain do not fetter the action of the reviewing board in its search for the truth. These principles are settled beyond debate. *State v. Certain Lands in Redwood Co. (Minn.)*, 42 N. W. 473; *Davidson v. New Orleans*, 96 U. S. 97; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 4 Sup. Ct. 663. Wider latitude is and should be allowed the legislature in tax proceedings in determining what hearing will satisfy the constitution. It cannot be doubted that under this general principle it would have been competent for the legislature to have provided, in the law under which the taxes in question were levied, that the hearing should be had, not in the earlier stages of the proceedings before the county board of equalization, but at a later period, to wit, in the action instituted to secure a tax judgment and before another tribunal, *i. e.* the district court. That hearing which the lawmaking power could have constitutionally declared sufficient it had the power to subsequently declare sufficient; the hearing being available to the citizen after the law providing for it had been enacted. On this branch of the case the decision of the Minnesota supreme court is directly in point. *State v. Certain Lands in Redwood Co. (Minn.)*, 42 N. W. 473. See, also, *Scott Co. v. Hines (Minn.)*, 52 N. W. 523. In *State v. Certain Lands in Redwood Co.*, JUDGE MITCHELL said: "Appellant's second point, to wit, that this statute violates section 7, art. 1, of the constitution, is predicated upon the assumption that it provides for the assessment of these back taxes without notice to the property owner,

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and without giving him any opportunity of being heard in the matter. Without following counsel through their exhaustive arguments upon this point, it is sufficient to say that it seems to proceed upon what we consider two false assumptions, to wit: First, that in proceedings in the exercise of the taxing power the property owner is entitled to notice, and to be heard in each preliminary step in the proceedings, *pari passu* with their progress; and, second, that under the tax law (Gen. St. 1878, c. 11, §§ 75, 79; Gen. St. 1894, §§ 1584, 1588) the defenses which he may interpose by answer, when the state applies for judgment, are so restricted as not to include all the objections which go to the merits of the proceedings. Where, as in the present case, the tax is levied on property, not specifically, but according to its value, to be ascertained by some person appointed for that purpose, undoubtedly a party is entitled to notice and an opportunity to be heard; but we know of no case where it was ever held that a party was entitled to notice of, and to be heard in, each step in tax proceedings as it is taken. We doubt whether any tax law ever provided for any such thing. The principle running through all the cases is that a law does not infringe upon the constitutional provision under consideration if the property owner has an opportunity to question the validity or amount of the tax either before that amount is determined or in subsequent proceedings for its enforcement. Whenever by law a tax is imposed upon property, and those laws provide for a mode of confirming or contesting it in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law. *Davidson v. New Orleans*, 96 U. S. 97; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 4 Sup. Ct. 663. This right is fully given under the sections of the tax law already referred to." The court in this case interpreted the same statute which

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we are here construing. Having borrowed our law from Minnesota with this construction already placed upon it, the legislature, under a familiar rule, must be deemed to have adopted the construction as a part of the act itself. It follows that our answer must be in the affirmative to the following question certified to us by the district court: "Should judgment be rendered in favor of the county for the taxes for the year 1889, with penalties and interest, regardless of the alleged failure of the county commissioners in that year to hold a session as a board of equalization?" We do not wish to be understood as holding that the act of 1897 operates to dispense with the necessity for any assessment or levy at all. The statute contemplates that there must be a valid assessment and levy antedating the institution of the action by the filing of the delinquent list. Aside from the matter of a hearing (for the hearing is allowed in the very action itself), the act is curative only as to the omission of something in relation to the assessment or levy, or of some step in the subsequent proceedings, and is not a law vesting in the courts all the powers of administrative officers to make assessments and levy taxes. Before the suit is commenced there must be a tax. In this respect we agree fully with the reasoning of the court in *Adams v. Tonella* (Miss.), 14 South. 17. Our criticism of that decision is that it assumes that a tax cannot be valid unless the hearing granted by the constitution has already been had when the action is instituted; whereas, it is not the fact that the party has been heard, but that he has at some stage, before his liability is finally established, a right to a hearing, which takes away the constitutional objection that his property is sought to be wrested from him without due process of law. Does the law give him a hearing? If so, it matters not that the time for the hearing has not arrived when the action to enforce the tax is commenced. It is, nevertheless, a valid tax because the right to be heard is protected. The fallacy of the opinion in *Adams v.*

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Tonella is that it assumed that, because the hearing had not been had when the action was brought, therefore the tax was void, although the very court which declared it void because the citizen had not yet been heard had fully authority and was commanded by the statute to grant him the very constitutional hearing the denial of which was held by the court to be fatal to the tax. But, so far as the court in that case recognized the necessity of a tax as the basis of an action under a statute like chapter 67 of the Laws of 1897, we fully indorse its views. The decisions in Minnesota, under practically the same statute, are in harmony with this interpretation of the law of 1897, *State v. Certain Lands in Redwood Co. (Minn.)*, 42 N. W. 473; *Commissioners v. Nettleton*, 22 Minn. 356. As the objection to the want of an opportunity to be heard is obviated by the statute, and as it cured all omissions in matters in relation to the assessment, levy, and subsequent proceedings, it is evident that at the time this tax action was instituted the taxes, so far as the omissions we have been considering are concerned, were valid taxes. If at the time the action is commenced there is no tax whatever, the institution of the suit will not authorize the rendition of a judgment therein as for the tax.

It is urged that judgment should not be rendered for the taxes of 1890, because the levy for that year was by percentages, and not in specific amounts, as required by the law of 1890, nor was the levy based upon an itemized statement. See section 48, c. 132, Laws 1890, and *Shattuck v. Smith (N. D.)*, 69 N. W. 5. Whether the curative feature of the act of 1897 relates to matters of substance as well as matters of form is not necessarily involved in the consideration of this point. It is evident from the opinion of JUDGE MITCHELL in *State v. Certain Lands in Redwood Co. (Minn.)*, 42 N. W. 473, that the supreme court of Minnesota considered it as embracing only omissions in matters of form. But even if we should hold that it included those steps in a tax proceeding which, accord-

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ing to the adjudications, are regarded as substantial, the question would still remain whether the failure to make the levy, according to the statute, is a mere omission of something in relation to the levy, or a total failure to make a levy at all. Had the statute required the board, in making the levy, to spread upon the record the names of the members voting and how they voted on the matter of levy, and were the omission before us an omission to follow this requirement of the law, we would have a case of the omission of something in relation to the levy, and not the failure of the board to make any levy at all. But the case we are called upon to decide is widely different. It is not a case where, disregarding the omission of the board, we can still say that there has been a levy made. The omission was in failing to levy the tax in specific amounts. It is evident that it is only by holding that the act of 1897 not only cures the omission, but also declares the act which was done, *i. e.* the levy by percentages, to be a good levy, that the validity of such levy can be sustained. Certainly a levy must be made in one of two ways, either in specific amounts or by percentages. At the time the pretended levy in question was made, a levy by percentages was not a levy at all. We have therefore the case of a failure to levy, and not a mere omission of some step in relation to the levy. The statement, in dollars and cents, of the sum of money for which the levy was made, was a vital part of the levy itself, and not some merely formal step in connection therewith. It is true that the legislature might have subsequently declared such levy valid. *Shattuck v. Smith* (N. D.), 69 N. W. 5. But the statute we are dealing with has no such scope. It cures omissions, but it does not attempt to provide that that which was not a levy at all is nevertheless to be deemed to have been a levy as fully as though the things done had been originally declared sufficient to constitute a legal levy. In *Commissioners v. Nettleton*, 22 Minn. 356, the court held, under a statute precisely the same, that when there is no such levy as the law requires, the

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statute is not curative of such failure to make any legal levy at all. As there was no levy made in 1890, and as the act of 1897 does not purport to transmute into a levy that which was not a levy originally, we must answer in the negative the following question certified to us by the district court, *viz.* : "Can judgment be rendered in favor of the county for the taxes of the year 1890, notwithstanding the finding as to the character of levy and the aforesaid evidence as to the failure to make an estimate of the county expenses and the levy based on the same?" Of course, the penalties and interest fall with the county tax, although the rest of the taxes for that year is unaffected. *State v. Certain Lands in Redwood Co. (Minn.)*, 42 N. W. 473.

We come now to another branch of the case. It is found by the district court that in each of the years 1891, 1892, 1893, and 1894 there was included in the levy for that year a specified sum of money for miscellaneous expenses. On the basis of this finding we are asked to hold the levy in each of these years void to the extent of the amount extended against the lands in question on account of these sums for miscellaneous expenses in the several years, respectively. At the time these levies were made the act of 1890, requiring an itemized statement to be made by the board of county commissioners as the basis of the county levy, and the levy itself to be made in specific amounts, was in force. As the appearance of the tax on the delinquent list created a *prima facie* case against the defendants (Laws 1897, c. 67, § 9), it is evident that, except in so far as there are findings in the case with respect to omissions in these tax proceedings, we must assume, in support of the tax, that every statutory step was regularly taken in the course of such tax proceedings up to the filing of the delinquent list in court. There being no finding that an itemized statement was not made in these years, we must assume that in each of such years such a statement was made. Now if in this statement, or in the levy of the tax, it appeared

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that there was an item for miscellaneous expenses, and this item was included in the levy for general county purposes, there would be nothing illegal in the action of the board in this respect. Assuming, in favor of the defendants, that section 1589 of the Compiled Laws of 1887 was not repealed by the act of 1890 (see the repealing section thereof, section 107), and that, therefore, the board was, under the act of 1890, restricted in the amount of its levy for general county purposes, yet, if the item for miscellaneous expenses was included in the general sum total of estimated county expenses for which a levy for general county purposes could be made up to the specified percentage permitted by statute, it is plain that no violation of the policy of limiting the amounts of levies for different purposes could result from sustaining a levy of which such an item formed a part. Had the board made a levy for all the purposes named in the statute, and had it then added a levy for miscellaneous expenses, the case would be radically different from the one which is before us. There is no finding that such is the fact. The finding is merely that in the levy made there is a sum for miscellaneous expenses. This finding is entirely consistent with this sum being set forth in the itemized statement as a part of general county expenses, and in the levy as an integral part of the levy for general county purposes. We must assume, in support of the tax, that a proper itemized statement, showing the different items of estimated county expenses, was made, and that this item for miscellaneous expenses is included in the list of such expenses. The presumption that the tax is legal cannot be overthrown by a finding of fact which is entirely consistent with the legality thereof. If the restriction on the amount of the levy, contained in section 1589, Comp. Laws 1887, was not abrogated by the act of 1890, then the county auditor, on comparing the amount of the levy with the assessed valuation as equalized by said board, and finding that the levy as made would necessitate his extending against the property for general county purposes a

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greater percentage than allowed by section 1589, Comp. Laws 1887, must have reduced the levy to the maximum percentage permitted by that section. Laws 1890, c. 132, § 48. In support of the tax we must assume that this was done or that the levy for general county purposes, in which this item for miscellaneous expenses must be deemed to have been included, did not exceed the maximum percentage allowed by the statute. We answer in the negative the following question certified to us by the district court, to wit: "Does the inclusion of a sum for miscellaneous expenses in the levy made by the county commissioners for the years 1891 to 1894, inclusive, prevent the attachment of interest and penalties on the taxes for the said year?"

Another defense is the statute of limitations. It is insisted that an action to enforce a tax is an action on a liability created by statute, and that, therefore, under section 5201, Rev. Codes, such Same—Tax Liens—Limitations. action must be brought within six years.

Our limitation statutes are made applicable to actions by or on behalf of the state. Section 5208, Id. As we view the case, the statute of limitations has no application to this proceeding. It is analogous to a proceeding to foreclose a tax lien. This action is not in *personam* but in *rem*. The land alone is proceeded against. No personal judgment is sought, nor does the statute contemplate that such a judgment should be rendered. We may assume that all right to recover a personal judgment for the taxes, the right to enforce which had accrued more than six years before this action was commenced, had been lost when this action was commenced. But this is not an action of that character. Our statutes have, from an early period, uniformly declared that the lien of taxes on real estate should be perpetual. Such is still the law. Pol. Code 1877, § 56; Comp. Laws 1887, § 1612; Rev. Codes 1895, § 1239; Laws 1897, c. 126, § 72. It is impossible to give effect to this word "perpetual" if we assume that any limitation law applies to the taxes themselves so as to utterly extinguish them, or to the right to enforce

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the lien thereof on the land against which they were levied. As a perpetual lien was given, it is obvious that it was not intended that after any period of time, however long, the taxes themselves should become extinguished or the lien thereof destroyed. So far as any right to enforce such taxes by an action against the owner of the land is concerned, it may be that the six-year limitation would apply. But the lawmaking power clearly manifested a purpose that no lapse of time should destroy taxes, or the right to enforce the lien thereof against the real estate on which they were levied, when it declared that such lien should be perpetual. A perpetual tax lien presupposes the continuance of the obligation of the citizen to pay the tax without reference to the lapse of time. A lien for taxes, after the taxes themselves have been wiped out, is unthinkable. And it is impossible to believe that the legislature meant to subject this lien, and the right to enforce it, to any limitation law; for then we would witness the anomalous condition, presented by a perpetual lien of a perpetual tax, without any power in the public to make such lien available. A lien that cannot be enforced is no lien at all. No person in purchasing the property subject to it would pay any heed to it, for it could never work him an injury. When the act of 1897 was passed, no flight of time would bar the right to foreclose these perpetual tax liens. The passage of that act has not made the six-year limitation statute, or any other limitation statute, applicable. Save in form, no change was wrought in the remedy by that statute. The remedy given thereby is analogous to a foreclosure suit. While there is some difference in the details or practice, the statutory remedy is, in substance, the same as the then-existing remedy by a bill in equity. The object of this proceeding is the same as that of a foreclosure action. It is to have the lien established for the amount thereof, and the property sold to satisfy the same. It follows that this statutory remedy is no more barred by the six-year limitation statute than a suit in equity would be; and, while the

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authorities are not uniform, yet the great weight of authority, as well as the better reason, is in favor of the doctrine that an action in equity may be maintained to enforce a lien, even after an action at law to recover the debt secured by the lien is barred by the statute. See *Norton v. Palmer*, 142 Mass. 433, 8 N. E. 346; *Shaw v. Silloway*, 145 Mass. 503, 14 N. E. 783; *Cerney v. Pawlot*, 66 Wis. 262, 28 N. W. 183; *Coles v. Withers*, 33 Grat. 186; *Smith v. Railroad Co.*, Id. 617; *Lashbrooks v. Hatheway*, 52 Mich. 124, 17 N. W. 723; *Webber v. Ryan*, 54 Mich. 70, 19 N. W. 751; *Baent v. Kennicutt*, 57 Mich. 268, 23 N. W. 808; *Pratt v. Huggins*, 29 Barb. 277; *Grant v. Burr*, 54 Cal. 298. And for cases exactly in point, under a statute making taxes a perpetual lien identical with ours, see *Beard v. Allen* (Ind. Sup.) 39 N. E. 665; *Adams v. Davis*, 109 Ind. 10, 9 N. E. 162; *Rinard v. Nordyke*, 76 Ind. 130; *Adams v. Osgood* (Neb.) 60 N. W. 869. It follows from these observations that we must answer in the negative the following question certified to us by the district court, to wit: "Is the statute of limitations, found in sections 5199 and 5201, Rev. Codes, a bar to this proceeding?"

The following questions can be considered together: "Are the penalties and interest allowed by the district court as to any of the lands involved in the three answers excessive or insufficient?" Same—Delinquent Taxes—Penalties.

"Should the judgment herein be modified in any respect?" It is claimed that chapter 132 of the laws of 1890 repealed all statutes regulating interest and penalties on taxes for 1887, 1888, and 1889, and that, therefore, interest thereon ceased to run after such law took effect. The general doctrine that one complete revenue law supersedes another is invoked by counsel for the defendants to sustain this contention. But repeals by implication are not favored. And the very repealing clause found in the act of 1890 negatives the idea that the legislature regarded that act as so complete in itself as to preclude the survival of any existing revenue statute. See section 107. As the act of 1890 is clearly prospective in its operation, there is

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nothing in its provisions inconsistent with the continued existence of the old statutes regulating interest on delinquent taxes. The old policy of imposing interest at the rate of 1 per cent. a month was continued by the law of 1890, and this is significant of a purpose not to abrogate such policy as to past unpaid taxes, but to leave those provisions of the old statutes which related to interest unaffected as to taxes which had been levied and had become delinquent under the previous system.

It is next urged that all right to interest ceased when the Revised Codes went into operation, *i. e.* January 1, 1896. It is true that the repealing section contained in the Revised Codes includes every statute on which rested the right to interest and penalties on taxes levied prior to the time when such Codes became law. But the feature common to all the prior statutes, that delinquent taxes should draw interest at the rate of 1 per cent. a month, was preserved. See sections 1610, 1611, Comp. Laws 1887; chapter 119, Laws 1889; section 1, c. 145, Laws 1890; section 1, c. 107, Laws 1891; section 1, c. 115, Laws 1893; section 1238, Rev. Codes. Section 2683 of the Revised Codes provides that "the provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof and not as new enactments." This feature of the prior acts is therefore to be regarded as never having been abrogated. It is merely continued in force, although, for convenience of future reference, the form is adopted of repealing all the existing laws containing it, and at the same moment reenacting it in the new revenue law. So far as penalties are concerned, it is unimportant to determine whether the old statutes are in this respect still in force as to past taxes, for the penalties on all those taxes accrued long before the Revised Codes became the law, and the repeal of a penal statute does not affect penalties which have accrued. Section 5142, Rev. Codes. All interest, however, will cease after the day when chapter 126 of the Laws of 1897 went into operation. This was March 8, 1897. The last section of this act (section

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110) repeals the revenue law contained in the Revised Codes. The new policy with reference to penalties and interest is so radically different from that found in the Revised Codes that it cannot be said to be a mere continuation of the old law in this respect. Compare section 71, c. 126, Laws 1897, with section 1238, Rev. Codes.

We will now take up each year separately, and determine what penalties and interest were due March 8, 1897. Under the law in force in 1887 (sections 1610, 1611, Comp. Laws 1887), a penalty of 5 per cent. must be added, with interest from the first Monday of February, 1888, at the rate of 10 per cent. per annum, and also in addition 1 per cent. per month to be added on the 1st of each month. The interest at the rate of 10 per cent. per annum will stop on January 1, 1896; this feature not being found in the Revised Codes. But the interest at 1 per cent. a month, payable on the 1st of each month, continues to the 8th of March, 1897; the feature of the old law as to this rate of interest having been continued in force by the Revised Codes. Total penalty and interest on taxes for 1887, 192 per cent. Under chapter 119, Laws 1889 (the interest feature of this law being continued under sections 1238, 2683, Rev. Codes), the total amount of penalties and interest on taxes for 1888, up to March 8, 1897, is 102 per cent. Under chapter 145, Laws 1890, total amount of penalty and interest on taxes for 1889 is 90½ per cent. Under section 66, c. 132, Laws 1890, penalties on taxes for 1891 are 10 per cent. The act of 1893 does not relate to back taxes. It is prospective in its operation. All that could be collected under section 66 of the revenue law of 1890 is the 10 per cent. penalty therein named. Under the act of 1893 the total amount of penalties and interest for taxes for 1892 is 51 per cent. Under the same act the total amount of penalty and interest for taxes for 1893 is 39 per cent. and on taxes for 1894 is 27 per cent.

The only remaining inquiries certified to us present the mineral land question, which we have already

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passed upon. See *Railroad Co. v. McGinnis* (N. D.) 61 N. W. 1832. The facts of this case are not more favorable to the railroad company than were the facts in that case. Without further discussion of that question, we will state our conclusion that all of the place lands described in the first and second answers were subject to taxation in the years in which taxes were levied against them. We therefore answer in the affirmative the two following questions certified to us by the district court, *viz*: "Were the lands described in said schedule, attached to said first answer, subject to taxation for the years 1887, 1888, and 1889?" "Were the lands described in said second answer subject to taxation in the years 1890, 1891, 1892, 1893, and 1894?" The judgment will be modified in conformity with the views expressed in this opinion. It is so ordered.

Since this opinion was written the decision of the federal supreme court in the case of *McHenry v. Alford* (decided Jan. 3, 1898, and not yet officially reported) 18 Sup. Ct. 242, has been rendered. That decision is

Same—Illegal
Taxation.

binding on this court, and it is therefore our duty to hold, in accordance therewith, that taxes levied against the place lands in 1887 and 1888 are not legal. To this extent our opinion is modified. It is not claimed by the counsel for the receivers that the taxes for 1889 are affected by that case. On the contrary, they concede that, under the evidence in this case, that decision has no bearing on the legality of such taxes.

BARTHOLOMEW, J. I concur in all that is contained in the opinion of the court in this case, except that portion thereof pertaining to the taxes for the year 1890. As to that I dissent.

NOTES.

Grants of Public Lands—Taxation.—Grants of public lands are not subject to taxation under the laws of any state or territory until, all preliminary steps having been taken in accordance with the terms of the act allowing the grant, the company has either

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obtained a patent or is entitled to do so. *Railroad Co. v. Prescott*, 16 Wall. (U. S.), 603; *Railroad Co. v. McShane*, 22 Wall. (U. S.), 444; *Railroad Co. v. Howard*, 52 Cal. 227; *Burlington, etc., R. Co. v. Hayne*, 19 Iowa 137; *Iowa Homestead Co. v. Webster Co.*, 21 Iowa 221; *Sioux City, etc., R. Co. v. Osceda Co.*, 43 Iowa 318; *C. B. & Q. R. Co. v. Holdworth*, 47 Iowa 20; *Cass County v. Morrison*, 5 Am. & Eng. R. Cas. 404, 28 Minn. 257; *Wis. Cent. R. Co. v. Taylor*, 1 Am. & Eng. R. Cas. 532, 52 Wis. 37.

Even if the patent be withheld, the land is taxable if the company have a clear equitable title. *Wis. Cent. R. Co. v. Price County*, 64 Wis. 579.

Under the grant to the Northern Pacific Company, the lands cannot be taxed until the costs of survey and selection have been paid to the government, as until then the title is not absolute. *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600.

Lands granted to the Northern Pacific R. Co. in Dakota are not subject to taxation until the cost of surveying them and selecting them has been paid into the United States treasury by the company, although the road has been built before the levy of the tax. *Northern Pacific R. Co. v. Rockne* (U. S.), 6 Sup. Ct. Rep. 201.

Where a statute granting land to a railroad provides that indemnity lands may be selected within prescribed limits, and that upon the approval of such selection by the secretary of the interior patents shall be issued therefor, the act of the secretary approving of the selection is judicial, and not ministerial, and until such approval has been made, the company has no such vested interest in the land as subjects it to liability for state taxes in respect thereof. The failure of the secretary of the interior to reject the selection made by the company does not amount to a constructive approval. *Wisconsin Central R. Co. v. Price County*, 41 Am. & Eng. R. Cas. 669, 133 U. S. 496.

Indemnity Land—Title—When Acquired.—In *Wisconsin Central R. Co. v. Price County*, 41 Am. & Eng. R. Cas. 669, 133 U. S. 496, FIELD, J., delivering the opinion of the court, said: The doctrine that until selection made no title vests in any indemnity lands, has been recognized in several decisions of this court. Thus in *Ryan v. Central Pac. R. Co.*, 99 U. S., 382, 386, in considering a grant of land by congress, in aid of the construction of a railroad, similar in its general features to the one in this case, the court said: "Under this statute, when the road was located and the maps were made, the right of the company to the odd sections first named became *ipso facto* fixed and absolute. With respect to the 'lieu lands,' as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed." And again, speaking of a deficiency in the land granted, it said: "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was, for that purpose." The selection had been approved by the secretary. In *St. Paul R. Co. v. Winona R. Co.*, 112 U. S. 720, 731, the court speaking of a previous decision, said: "The reason of this is that, as no vested right can attach to the lands in place (the odd-numbered sections within six miles of each side of the road) until these sections are ascertained and identified by a legal location of the line of the road, so, in regard to the lands

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to be selected within a still larger limit, their identification cannot be known until the selection is made. It may be a long time after the the line of road is located before it is ascertained how many sections, or parts of sections, within the primary limits, have been lost by sale or pre-emption. It may be still longer before a selection is made to supply this loss." In *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.*, 117 U. S. 406, 408, 24 Am. & Eng. R. Cas. 100, where the railroad grant as to indemnity lands was substantially similar to the one in this case, and one of the questions was as to the title to the indemnity lands, the court said: "No title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and the selection made approved by the secretary of the interior." In *Barney v. Winona & St. P. R. Co.*, 117 U. S. 228, 232, 26 Am. & Eng. R. Cas. 513, the court said: "In the construction of land-grant acts in aid of railroads, there is a well-established distinction observed between 'granted lands' and 'indemnity lands.' The former are those falling within the limits specially designated, and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the land department, as of the date of the act of congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection." The same view has been held by different attorney generals of the United States, in their official communications to heads of the departments, where selections of the public lands have been granted, subject to the approval of the secretary of the interior, (*Cape Mendocino Light-House Site*, 14 Ops. Atty. Gen. 50; *Portage Land Grant*, *Id.* 645,) and such has been the consistent practice of the land department. The uniform language is that no title to indemnity lands becomes vested in any company or in the state until the selections are made; and they are not considered as made until they have been approved, as provided by statute, by the secretary of the interior. It follows from these views that the indemnity lands described in the complaint were not subject to taxation as the property of the railroad company in 1883. *United States v. C. P. R. Co.*, 24 Am. & Eng. R. Cas. 120, 26 Fed. Rep. 479.

Land Grants—Nature and Scope.—See 1 Am. & Eng. R. Cas., N. S., 597, *notes*.

Same—Title—How Acquired.—See 1 Am. & Eng. R. Cas., N. S., 618, *notes*.

Same—Forfeiture.—See 1 Am. & Eng. R. Cas., N. S., 658, *notes*.

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TAYLOR *et al.*

v.

PORTSMOUTH K. & Y. ST. RY.

MARSHALL

v.

SAME.

(*Supreme Judicial Court of Maine, Jan. 3, 1898.*)

Use of Street—Public Nuisance—Right of Abutting Owner to Enjoin.*—Equity will not enjoin a public nuisance on the application of an individual, either in his own behalf, or in behalf of himself and others of like interest who either do or do not join in the application, unless some special damage to the individual, not suffered in common with the public generally, has been sustained.

Same—Public Use—Rights of Abutting Owners.—The public may regulate by law the use of its public ways in such manner as the legislature may think will best serve the public interest. The kind of use that may be permitted is of no consequence to the abutting landowner. He has been paid his damages for the creation of the way, so that the public controls its use, and he must take his chance with the rest of the community in which he lives of any inconvenience suffered by reason of the use that the public may see fit to permit.

Same—Street Railways—Additional Servitude.*—Where the plaintiffs, as abutting proprietors and owners of the fee in a public way, sought to enjoin the location of a street railway within the limits of a public way, *held*, that the railway company is allowed to share with the public its right of transit over the same, and its location does not create any additional servitude.

Same—Rights of Abutting Owners.—Also, that the plaintiffs have suffered no damage from the defendant's occupation in common with the public of some share in the easement acquired by it upon the creation of the way; so that they have no cause for complaint on account of the construction of defendant's railroad, not common to the public in general, and therefore have suffered no special damage, and can have neither an action at law nor relief in equity.

Same—Public Uses—Motive Power.—In considering such use of public ways for surface transit, the court holds that it matters not what the motive power used may be, nor whether the transit be the carriage of passengers, of freight, or the transmission of intelli-

*See notes at end of case.

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gence, by telegraph or telephone, or of water, gas, or sewage. All these are public uses that the public may permit, regardless of the individual, so long as they do not infringe the statute which defines what the public use may be.

De Facto Corporation—Validity of Charter—Province of State.—Whether a corporation created by special act of the legislature, instead of being organized under the general law, as provided in article 4, § 14, of the constitution of Maine, is a violation of the constitution, is a question that does not arise in this proceeding. *Held*, that the state only can inquire into the validity of the charter of the defendant company, it appearing to be a *de facto* corporation, at least, acting under a charter from the legislature.

Municipal Authority.—*Held*, in this case, that the municipal officers had properly approved the location of the street railway.

(Official.)

REPORT from York county supreme judicial court.
Bills dismissed.

G. M. Seiders, F. V. Chase, Frank D. Marshall,
and *James T. Davidson*, for plaintiffs.

H. M. Heath and C. L. Andrews, for defendant.

HASKELL, J. Bill in equity by the abutting owners of land on a public way to enjoin a railway company from use of the way because such use creates a public nuisance.

Nothing is better settled in this state than that equity will not enjoin a public nuisance on the application of an individual, either in his own behalf or in behalf of himself and others of like interest who either do or do not join in the application, unless some special damage to the individual, not suffered in common with the public generally, has been sustained. Pom. Eq. Jur. § 1349, and cases cited. Equity supplements the law, and there is no need of remedy where there are no damages at law. *Staples v. Dickson*, 88 Me. 362, 34 Atl. 168; *Holmes v. Corthell*, 80 Me. 31, 12 Atl. 730.

The bill also seeks an injunction because the plaintiffs are not only abutters, but owners, of the fee of the way subjected to the servitude incident to public ways, and that the defendant's use is an additional servitude, for which they are entitled to compensation, that must first be paid before the servitude may be enjoyed; and this

Use of Street—Injunction.

Same—Public Use—Rights of Abutting Owners.

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is the main controversy in the cause, for, if the defendant's use of the way be no additional servitude, then the plaintiffs' right in the way and its use are merged with those of the public, and the public alone, by its laws, must define, control, and regulate such use.

What servitude, then, does the public acquire by the taking of land for a public way? It is the right of transit for travelers, on foot and in vehicles of all descriptions. It is the right of transmitting intelligence by letter, message, or other contrivance suited for communication, as by telegraph or telephone. It is the right to transmit water, gas, and sewage for the use of the public. It is a public use for the convenience of the public, to be molded and applied as public necessity or convenience may demand, and as the methods of life and communication may from time to time require. Society changes, and new conditions attach themselves. The change evolves new ways of doing things, new methods of communication, new inventions for travel. When the way is constructed, the landowner has his compensation, not only for the land taken, but for the damages sustained, although usually benefits are conferred rather than injury inflicted. These damages are assessed as compensation for a surrender of his land to the public use for travel and transit, not only by the methods then applied, and for the volume then existing, but for all time and for such future use as the exigencies of the time may develop.

Same—Street
Railways—Addi-
tional Servitude.

When the way has been created, the public controls its use, and regulates its repair by laws that the legislature shall enact. Under these laws, the use must be governed, for the people have a right to say what use will best subserve their interests. They have now said that ways shall be maintained "so as to be safe and convenient for travelers with horses, teams, and carriages." That is now the criterion, and a use that infringes upon that rule becomes an unlawful use, and may be prohibited by public prosecution. That rule may be changed, for the public, by law, may regulate

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the use of its public ways in such manner as the legislature may think will best serve the public interest.

This doctrine allows the public to control the use of public ways for travel and communication, as it may be pleased, from time to time, to do. The kind of use that may be permitted is of no consequence to the abutter. He must take his chance with the rest of the community in which he lives. Some cases may seem to work hardship, but, it is better so than to embarrass the convenience of the people, and cripple and annoy enterprises which the present and future may recognize as necessary for the good and happiness of society.

No matter whether the way be used by the lone traveler on foot or on his wheel, by the two-horse chaise or four-wheeled carriage, by the dray, cart, or coach, or by cars that may be permitted to run in the street, whether propelled by beast, steam, electricity, or any other agency that may be discovered suitable for the purpose. No matter whether the vehicle carries passengers or freight, or passes intelligence along its contrivance. All these are public uses, and, so long as they do not infringe the laws that regulate the use of highways, they cannot be prohibited either by the individual or public prosecutor. Ways must be "safe and convenient." When they are not, by reason of any incumbrance or permitted use, then ample remedy may be had by public action, and such incumbrance or use may be removed or prohibited.

The servitude complained of in this cause, therefore, is a public servitude, and lawful, so long as it does not infringe the laws of the state regulating the use of ways. It gains no hold upon the soil of itself, but is allowed a share of the public use. Should that use be extinguished, its rights would be extinguished also. It must exist or fall with the servitude of the public; otherwise, the doctrines of this opinion would be illogical. If it gained any vested right in the soil that the public could not extinguish, then, manifestly, it has

Same—Rights of
Abutting Owners.

Same—Public Uses—
Motive Power.

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created an additional servitude, and taken land without compensation to the owner.

These doctrines have been discussed in the numerous courts of this country with varied results. It will not be profitable to review them, for we think best to declare a doctrine best suited to the convenience of our people, and most consonant with the laws under which we live. We have persistently maintained the right of "free fishing and fowling," free and unobstructed navigation of our rivers, the free taking of ice upon them, the right of eminent domain over and in the waters of great ponds; and we now assert the right of the people to control the use of their public ways as shall best meet their necessities, without vexation from the landowner, whenever growth and discovery show the convenience of applying new methods for public transit. Let a public way once constructed be free for the public use and control as it may choose. Let it be free as the ocean is free, as our rivers are free, and as our great ponds and lakes are free, for the use of all the people.

If the reverse of this doctrine be held, the numerous street railways now operating in our state would be crippled, if not destroyed. If every abutter could enjoin their operation unless his damages were paid, there would be no end of litigation and confusion. Moreover, it is now too late to invoke such doctrine. We have already decided that a street railway propelled by electricity creates no additional servitude. *Briggs v. Railroad Co.*, 79 Me. 363, 10 Atl. 47. Relying upon that doctrine, electricity has become the principal motor for all our street railroads; and it would be unjust to now overturn it, if we were inclined so to do. On the contrary; we deem it best, and most consistent with our laws and polity, to affirm it, and, further, that neither motor nor kind of traffic to be engaged in makes any difference, so long as the use does not violate the requirements of the statute, concerning which we are not called upon to decide at the instance of an individual.

Now, it may be said that the location of a street

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railway, by authority of the legislature, should give it a vested right to remain after the discontinuance of the way. But it must be remembered the legislature only gave a right to share the public easement, and, when that shall be extinguished, all the granted right will be extinguished. It may be that the act of the legislature granting a share in the easement gives a vested right therein, that can only be extinguished by the consent of the grantee, or by authority of the legislature granting it. Of this we have no occasion to decide.

The doctrine of this opinion must not be extended too far. Perhaps the fair inference will be that the taking of land for a way only contemplated surface transit. We do not decide otherwise. When elevated systems of transit are introduced, the permanence of their structure and the annoyance and injury may, perhaps, seem fairly to contemplate a further servitude. Of this, too, we have no occasion to decide.

It must be remembered that the use of ways for street-car transit can be enjoyed only by the act of the people themselves. Their ballots control; and, if they share their use with others who aid in serving the use common to both, it is a public use, after all. The public grant the privilege, and control its enjoyment. The exercise of such power best serves our people, who are intelligent enough to understand their necessities and comforts.

But the plaintiffs say that the charter of defendant company is void for constitutional reasons. This contention is not open in this cause. The defendant is acting under a charter from the legislature. It is a *de facto* corporation, at least. The state only can inquire into the validity of the charter. But, if the contention were open to the plaintiffs, it could do them no good. They have impleaded the defendant as a corporation, and joined no other persons. If it has no corporate existence, who shall be enjoined? The only prayer in the bill is that defendant corporation be enjoined. If there

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be no corporation, how can it be enjoined? Suppose plaintiffs had sued a dead man; could they have relief?

It is also contended that the proper approval of the location of the road has not been obtained from the municipal officers of the town. ^{Municipal Authority.} We think the evidence shows the reverse. There is no occasion to review it.

How, then does the cause stand? The plaintiffs, as abutters and owners of the fee of the way, have suffered no damage from the defendant's occupation in common with the public of some share in the easement acquired by it upon the creation of the way, so that they have no cause for complaint on account of the construction of defendant's railroad, not common to the public in general, and therefore have suffered no special damage, and can have neither an action at law nor relief in equity.

Bill dismissed, with costs.

NOTES.

Use of Street—Public Nuisance—Right of Abutting Owner to Enjoin—No right of action accrues to an abutting lot owner against a railroad company for operating its railroad in the street in the usual way, by leave of the city, where the injury is only such as the general public sustains. *Dwenger v. Chicago & G. T. Ry. Co.*, 98 Ind. 153, 20 Am. & Eng. R. Cas. 26.

Mere consequential disadvantages of a street railroad to a particular locality, by reason of the depreciation in value of adjoining property, cannot be the subject of a private action. *Carson v. Central R. Co.*, 35 Cal. 325.

The construction and operation of a horse railway in the public streets of a city do not entitle a private individual to compensation unless his property is specially damaged. He is entitled to recover the damages which his property has actually sustained. *Campbell v. Metropolitan St. R. Co.*, 82 Ga. 320, 9 S. E. Rep. 1078.

Upon a bill for injunction, an allegation that the location of a street railroad will inconvenience the complainant's business and diminish the value of his property is material and significant only where the road is constructed without authority, and the evil complained of is a public nuisance, as showing that the complainant has sustained special injury. *Hogencamp v. Paterson Horse R. Co.*, 17 N. J. Eq. 83.

But where the laying of the track and the use of the road are authorized by the municipal authorities, its location rests in the

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discretion of the corporation or of those having the control and regulation of the streets. It cannot affect the question of right. *Hogencamp v. Paterson Horse R. Co.*, 17 N. J. Eq. 83.

Although the unauthorized occupation of a public street by a railway track may be regarded as a nuisance, *per se*, which will be enjoined, an injunction against it will not be granted at the suit of a private citizen or a corporation, unless the plaintiff can make out a case of special damage. *Larimer & L. St. R. Co. v. Larimer St. R. Co.*, 137 Pa. St. 533, 20 Atl. Rep. 570; *Shipley v. Continental R. Co.*, 13 Phila. (Pa.), 128; *Watkins v. West Phila. Pass. R. Co.*, 1 Pa. Dist. 463.

Where a railroad is authorized by an act of the legislature, and constructed over streets by consent of the municipal authorities, it cannot be restrained as a nuisance. *Milburn v. Cedar Rapids*, 12 Iowa 246; *Hughes v. Mississippi & M. R. Co.*, 12 Iowa 261; *Gear v. Chicago, C. & D. R. Co.*, 39 Iowa 23; *Cook v. Chicago, M. & St. P. R. Co.*, 83 Iowa 278.

In the absence of any allegation or proof that a railroad is improperly constructed or conducted, or uses defective machinery, or in any way occasions injury not incident to the prudent and lawful exercise of its right to operate a road under permission from the city, plaintiff is not entitled to an injunction or damages. *Hill v. Chicago, St. L. & N. O. R. Co.*, 38 La. Ann. 599.

A railroad running through the streets of a city, which does not materially interfere with the use of the streets for ordinary purposes or injure the value of adjacent property, cannot be restrained as a nuisance. *Hamilton v. New York & H. R. Co.*, 9 Paige (N. Y.), 171.

An abutting owner is not entitled to an injunction to restrain a railroad in the street unless the injury to him amounts to a private nuisance, and the damage is irreparable. *Magee v. London & P. S. R. Co.*, 6 Grant's Ch. (U. C.), 170.

Use of Street by Street Railways—No Additional Servitude.—A horse railway on the streets of a city is not an additional burden upon the soil of the street so as to entitle the abutting land owners to compensation. *Randall v. Jacksonville St. R. Co.*, 17 Am. & Eng. R. Cas. 184, 19 Fla. 409; *Elliot v. Fair Haven & W. R. Co.*, 32 Conn. 579; *Floyd County v. Rome St. R. Co.*, 77 Ga. 614, 3 S. E. Rep. 3; *Briggs v. Lewiston & A. Horse R. Co.*, 32 Am. & Eng. R. Cas. 167, 79 Me. 363, 10 Atl. Rep. 47; *Williams v. City Elec. St. R. Co.*, 43 Am. & Eng. R. Cas. 215, 41 Fed. Rep. 556; *Hiss v. Baltimore & H. Pass. R. Co.*, 4 Am. & Eng. R. Cas. 201, 52 Md. 242, 36 Am. Rep. 371; *Eichels v. Evansville St. R. Co.*, 5 Am. & Eng. R. Cas. 274, 78 Ind. 261, 41 Am. Rep. 561; *Hodges v. Baltimore Union Pass. R. Co.*, 10 Am. & Eng. R. Cas. 270, 58 Md. 603; *Attorney-General v. Metropolitan R. Co.*, 125 Mass. 515; *Detroit City R. Co. v. Mills*, 46 Am. & Eng. R. Cas. 608, 85 Mich. 634, 48 N. W. Rep. 1007; *People ex rel. v. Ft. Wayne & E. R. Co.*, 92 Mich. 522, 52 N. W. Rep. 1010; *Dean v. Ann Arbor St. R. Co.*, 93 Mich. 330; *Elfelt v. Stillwater St. R. Co.*, 53 Minn. 68, 55 N. W. Rep. 116; *Van Horne v. Newark Pass. R. Co.*, 50 Am. & Eng. R. Cas. 235, 48 N. J. Eq. 332, 21 Atl. Rep. 1034; *Brooklyn C. & J. R. Co. v. Brooklyn City R. Co.*, 33 Barb. (N. Y.), 420; *Brooklyn City & N. R. Co. v. Coney Island & B. R. Co.*, 35 Barb. 364; *Smith v. East End St. R. Co.*, 38 Am. & Eng. R. Cas. 470, 87 Tenn. 626, 11 S. W. Rep. 709; *Texas &*

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P. R. Co. *v.* Rosedale St. R. Co., 22 Am. & Eng. R. Cas. 160, 64 Tex. 80; Belt Line St. R. Co. *v.* Crabtree, 2 Tex. App. (Civ. Cas.), 579.

And the same doctrine is held applicable to electric railways. Central Pa. Tel. Co. *v.* Wilkes-Barre & W. S. R. Co., 1 Pa. Dist. 628.

A street railway properly constructed and lawfully authorized does not impose such a new burden as to entitle an adjacent owner of property to compensation therefor. Ransom *v.* Citizens' R. Co., 104 Mo. 375, 16 S. W. Rep. 416.

See Green *v.* City & S. Ry. Co. *et al.*, 1 Am. & Eng. R. Cas., N. S., 206; 6 *Id.* 792 *abstr.*; and 7 *Id.* 787 *abstr.*

ASHLAND & C. ST. RY. CO.

v.

FAULKNER.

(*Court of Appeals of Kentucky, March 26, 1898.*)

Street Railways—Proximity to Abutting Property—No Additional Servitude.*—A street railway may be placed and operated upon any part of a public street of a municipal corporation which is used by vehicles without increasing the burden of the servitude, and the owner is not entitled to compensation because of such use of the street upon which his property abuts merely because he is affected by the proximity of the tracks to his property, without proof of special damage resulting therefrom.

Same—Excessive Verdict—Errors.—Where the verdict is excessive, and it appears that the jury may have been influenced by the submission of questions of fact not authorized by the proof, judgment for plaintiff should be reversed and the cause remanded.

APPEAL by defendant from Boyd county circuit court. *Reversed.*

R. C. Burns, for appellant.

James Andrew Scott, L. T. Everett, and *Brown & Brown*, for appellee.

BURNAM, J. This suit was instituted by appellee against appellant, the Ashland & Catlettsburg Street-Railway Company, for damages arising from the location and operation of its road.

Case Stated.

He claims to be the owner of a lot of ground fronting the Ashland & Catlettsburg turnpike road, on which he had

*See note at end of case.

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erected a frame building 42 feet long and 16 feet wide, in which he did business as a saloon keeper ; that, in the construction of the building, he had left an intervening space of about ten feet between the front of the building and his property line on the east side of the turnpike road, and that, for the convenience of his patrons, he had constructed in this open space a well, put up a water trough, and laid down a platform 10x16 feet, on which wagons and other vehicles could stand when stopping in front of his saloon ; that, as a result of these conveniences, his business was rendered profitable from the patronage of travelers upon this highway ; that the appellant forcibly and without right, took possession of a portion of that part of his lot which was next to and adjoining the turnpike road, and had built and was operating an electric street-car line thereon. And, by the second paragraph in his petition, he alleges that appellant had wrongfully constructed his line of street railway on the turnpike road, so close to his property as to obstruct his ingress and egress from his property to the public highway. It will be observed that appellee seeks damages—First, for the illegal appropriation of a part of his lot ; and, second, damages which result from building the street railway on the land of the turnpike company so close to his building as to materially injure his use of the turnpike. Pleadings being made up, the trial of the case resulted, under instructions given to the jury, in a verdict for appellee for \$665, the basis of the recovery being both elements of damage enumerated above ; and we are asked to reverse that judgment.

The court, on motion of plaintiff, instructed the jury, first, that “if they believed from the evidence that the plaintiff, John Faulkner, was the owner and in possession of the property in controversy, and that the defendant, the Ashland & Catlettsburg Street-Railway Company, while plaintiff was the owner and in the possession of said property, by its officers, agents, or employees, entered upon said property, and constructed its line of street railway in front thereof on

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said property, the law is for the plaintiff, and the jury will so find." And, in fixing the measure of compensation under the state of case contemplated in the first instruction, the jury were told by instruction No. 3 that, "if they believed as in instruction No. 1, they will find from the evidence the market value of the entire tract of land just before it became generally known that the street railway was to be constructed in front of it, and find the value of the ground taken and occupied by it for all the purposes for which it was adapted, and to this sum they will add the amount, if any, they believe from the evidence the remainder of the tract is diminished by reason of the construction and operation of defendant's road." On the issues raised by the second paragraph, the court instructed the jury that "if they did not believe from the evidence, and find as in instruction No. 1, but believed from the evidence that the defendant constructed its track upon the Ashland & Catlettsburg Turnpike Road, so close to plaintiff's property as to unreasonably interfere with the ingress and egress to and from said property, the law is for the plaintiff, and the jury will so find." And in defining the measure of compensation, if they found the facts to be as set out in instruction No. 2, they were told to find from the evidence the value of plaintiff's property just before it became generally known that the defendant's railway was to be located in front of plaintiff's property, and then determine what proportion of the value is taken from the property by reason of the construction and operation of defendant's road, and such proportion would be the amount of damage. The proof in the record shows that the east rail of the street-railway track is about seven feet from appellee's building; that the track at that point was laid down at grade on the road, and that the only elevation was the height of the rails, two or three inches; that the road between the rails was ballasted with gravel; that a crossing of three-inch plank was put on each side of the track, twelve or fifteen feet long, making a good crossing where wagons and other

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vehicles could pass over or be backed in across the track at that point to appellee's house from the turnpike road on the west side of the railway track; and that appellant's road was built on the east side of the turnpike road. There is no proof which conduces to show that the approach to appellee's property has been interfered with by the building of the road, except by its proximity to the building, and that it is a new use of the street at that point, which, in some degree, interferes with appellee's use.

The question before us, therefore, is, was there such obstruction as to authorize recovery on this branch of the case? If the diminution in the value of appellee's property arose solely by reason of the location of the road in front of his property, this of itself furnishes no ground of complaint, as the whole trend of modern authorities is to the effect that the operation of a street railway is a legitimate use of the highway, and an exercise of the public right of travel. They are but a means of using the public streets to a greater advantage for the very purpose for which they were laid out, and are recognized as the best and cheapest mode yet devised of getting about in a city, and do not impose any new or additional burdens for which abutters are entitled to compensation, unless they be so constructed as to deprive the abutter of some easement, or in some way cause him special damage for which he is entitled to recover, as they do not hinder the use of the rest of the street for the public travel, and in but a very small degree obstruct travel on the part occupied by their tracks. See *Wood, R. R.*, 748, and authorities there cited, and 3 *Elliott, R. R.* 1635. On this point JUDGE DILLON says: "The appropriation of a street for a horse railway, and used in the ordinary mode, is such a use as falls within the purposes for which the street was dedicated or acquired under the power of eminent domain." *Dill. Mun. Corp.* (3d Ed.) § 722. Judge Cooley says: "When land is taken or dedicated for a town street, it is unquestionably appropriated for all the ordinary purposes of a town street, not merely for

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the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants. Among these purposes is the use for carriages which run upon a grooved track; and the preparation of important streets in the cities for their use is not only a frequent necessity, which must be supposed to have been contemplated, but is almost as much a matter of course as the grading and paving." Cooley, Const. Lim. 556.

As early as 1872 this question was thoroughly considered by the court of appeals of New York in the case of Killinger v. Railroad Co., 50 N. Y. 206. In that case the plaintiff alleged that the track of defendant's road was unnecessarily or negligently or willfully laid so near the sidewalk as to impair the use of his premises, and depreciate its rental value. The court held that "abutting owners have an easement in the street, in common with the whole people, to pass and repass, and also to have free access to their premises; but the mere inconvenience of such access occasioned by the lawful use of the street is not the subject of action." The supreme court of Pennsylvania has also thoroughly considered this question in the case of Rafferty v. Traction Co., 147 Pa. St. 579, 23 Atl. 884. This was an injunction suit to prevent the laying of rails on a street in such proximity to the curb as to interfere with the ingress and egress of the abutting property holders, and the rights of such property holders were exhaustively discussed by the court. It was claimed by the plaintiffs that their right of free access to their property along the street was interfered with because vehicles could not stand between the tracks and the curbing without interfering with the cars. It was held that "the right of the property holder is not changed in this respect. He has the same right after the tracks are laid as he had before. It is a right which must be exercised in reason, whether there are car tracks on the street or not. In no circumstances does it confer the privilege of obstruction by unreasonable use, but the reasonable exercise of the

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right gives the street car company no right to arrest it"; the court finally holding that "the operation of a street railway by electricity is not an additional servitude or burden on the land which will entitle the owner of property abutting on the street to compensation, either by injunction for damages by the construction and maintenance of such a track. * * * If, at any time, the owner of property abutting on the street has occasion for the presence of vehicles in front of his property on the street to take away or deliver persons or goods, he may exercise that right for such reasonable time as is necessary for his purpose; and if, in the exercise of such right, the passage of street cars is impeded, the street cars must wait." In the case of *Williams v. Railway Co.*, 41 Fed. 556, the court said: "The operation of a street railway by mechanical power is not an additional servitude or burden on land already dedicated or condemned to the use of a public street, and is therefore not a taking of private property, but is a modern and improved use of the street as a public highway, and affords to the abutting property holder, though he may own the fee of the street, no legal ground of complaint." In the case of *Briggs v. Railroad Co.*, 79 Me. 363, 10 Atl. 47, the court said: "We do not think any construction and operation of a street railway in a street is a new and different use of the land from its use as a highway. The laying down of rails in the street and the running of street cars over them for the accommodation of persons desiring to travel on the street is only a later mode of using the land as a way, using it for the very purpose for which it was originally taken." In the case of *Railroad Co. v. Grundy*, 26 Atl. 788, the supreme court of New Jersey held that "abutting owners' rights in a street in front of their property are subservient, unless such use imposes an additional servitude upon the land taken by the street or the abutting land; but when a public use, authorized by law, takes no property of the individual merely affecting him by proximity, the necessary interference with his business or the enjoyment of his

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property occasioned by such use furnishes no basis for damages." In the case of *Railway Co. v. Mills* (Mich.) 48 N. W. 1011, the court held that "street railways, when constructed so as not to interfere with the rights of others upon the streets, form no obstruction to such use and enjoyment. They make no more noise than the omnibus and other heavy vehicles, are not more dangerous, and no more interfere with access to the abutting lots. They constitute a modern and improved use only of the street as a public way"; holding that the abutting property owner would not be entitled to compensation for such use, in the absence of a statute giving it or plain proof of such injury. In the case of *Louisville Bagging Mfg. Co. v. Central Pass. Ry. Co.*, 95 Ky. 50, 23 S. W. 592, this court said: "It is well settled that the use of a public street for travel and transportation by means of railway cars falls within the purposes for which streets are dedicated; and it is only when other ways of travel and transportation are prevented or unreasonably obstructed that courts can interfere to either enjoin or limit the operation of railroads upon a public street. * * * The trolley system of operating street cars, when properly adjusted, is not much, if any, more dangerous than horse power. * * * Moreover, while street-railway cars thus operated go at a greater rate of speed, and are more comfortable, and must in time become a cheaper mode of travel, they can be easier controlled than horse cars, and do not really more obstruct the street or interfere with business transacted thereon."

This question has been so exhaustively discussed, both in cases and text-books, as to leave but little to be said; and the rule is that a street railway may be placed and operated upon any part of a public street of a municipal corporation which is used by vehicles without increasing the burden of the servitude, and the owner of the fee is not entitled to compensation because of such use of the street upon which his property abuts

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merely because he is affected by the proximity of the tracks to his property, without proof of special damage resulting therefrom. It does not appear that there was such obstruction of appellee's use of the public highway in front of his house by the railway as would justify recovery, if, as a matter of fact, the railway was built entirely upon the turnpike road. While it is true that there is not sufficient room between the tracks and the house of appellee for wagons and other vehicles to stand as they formerly did, there is nothing to hinder vehicles from being driven across the tracks at that point, or standing on the space between the rails, as cars pass there only at intervals of 10 or 15 minutes. Most of the witnesses who testify on this point state that there was no diminution whatever in the salable value of appellee's property resulting from the operation of the road, and no witness except appellee himself fixes the damages as high as the verdict of the jury. The verdict is excessive, and palpably against the weight of the evidence, and the proof did not authorize the submission to the jury of the questions of fact embraced in instructions Nos. 2 and 4. But upon the question as to whether appellant had appropriated, for the use of its track, land to which appellee actually held the legal title, the proof is conflicting, and, in our opinion, this issue was properly submitted to the determination of the jury; but, as it is impossible to say how much the verdict of the jury may have been affected by the other question, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

Same—Excessive
Verdict—Errors.

GUFFY, J. dissented.

NOTE.

Whether a Street Railway is an Additional Servitude.—See 1 Am. & Eng. R. Cas. N. S., a. 103.

Same—Proximity of Tracks.—Though the fee to the streets in New York be in the city, still abutting property owners have an easement in the streets to pass and repass, and convenient access to

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and from their premises, which they may protect; but they cannot maintain an action for the mere inconvenience occasioned by the lawful use of the street for a street surface railway. *Kellinger v. Forty-second St. & G. S. F. R. Co.*, 50 N. Y. 206, 3 Am. Ry. Rep. 77.

When the public authorities have taken possession of a street or highway, and regularly defined the interests and improvements necessary for the use of the public by establishing grades, etc., lot owners have the right to make their improvements in reference thereto, and no subsequent change which obstructs or impairs access to such improvements can lawfully be made without compensating for the injury. A finding of the court that such injury will result from laying a street-railroad track near the side-walk, in front of the owner's house, shop, etc., is in no way qualified or affected by the further fact, also found, that when the interests of the company and of the general traveling public are also taken into the account, the location would be as little injurious as in any other part of the highway. *Cincinnati & S. G. A. St. R. Co. v. Cummins ville*, 14 Ohio St. 523.

Inconvenience or annoyance to property owners, or interference with business or travel along a highway which a street passenger railway proposes to occupy, is no ground to prevent the construction of a railway, under Pa. Act of May 14, 1889. *Hain v. Lebanon & A. St. R. Co.*, 1 Pa. Dist. 452.

Street-railway companies have no right of eminent domain; and can acquire no right by contract with a city to obstruct, for purposes of its construction, the right of ingress and egress appurtenant to the abutting lots, even where the owners thereof have no fee in the street. But construction of a road upon the city's established grade of the streets, under a lawful contract with the city authorities, and in a lawful manner, exonerates the company from liability, in this particular, to the abutting owners. *Smith v. East End St. R. Co.*, 38 Am. & Eng. R. Cas. 470, 87 Tenn. 626, 11 S. W. Rep. 709.

In Ohio and Wisconsin it is held, in the absence of a constitutional provision relating to damages for merely injuring property, that an abutting owner is entitled to damages, if a street-car line materially impairs his free access to the street. *Cincinnati & S. G. A. St. R. Co. v. Cummins ville*, 14 Ohio St. 523. *Hobart v. Milwaukee City R. Co.*, 27 Wis 200.

South Carolina & G. R. Co. *v.* Deitzen

SOUTH CAROLINA & G. R. Co.

v.

DEITZEN.

(Supreme Court of Georgia, July 10, 1897.)

Actions for Injuries—Accidents in Foreign States—Venue.*—An act of the general assembly of Georgia, which establishes jurisdiction of suits against railroad companies, and prescribes that suits for damages for injuries to person or property shall be brought in the county in which the cause of action originated, if the company has an agent in such county, if not, then in the county of the residence of the company, refers to causes of actions originating in the counties of this state, and does not apply to causes of action originating outside the limits of the state. (a) As to the latter, the law in force at the time of the passage of the act is not affected by its terms.

(Syllabus by the Court.)

ERROR by defendant from city court of Richmond county. *Affirmed.*

Joseph B. & Bryan Cumming, for plaintiff in error.

Fleming & Alexander, for defendant in error.

LITTLE, J. The defendant in error brought suit against the plaintiff in error in the city court of Richmond county to recover damages sustained by him in being unlawfully ejected from the train of the plaintiff in error in the state of South Carolina. The plaintiff in error demurred to the petition on the ground that it appeared from the petition that the court had no jurisdiction of the action, and that judgment rendered by a court in Richmond county would be void. The demurrer was based on the provisions of section 2334 of the Civil Code, which declares that all railroad companies shall be sued in the county in which the cause of action originated ; that any judgment rendered

*See *Rudiger v. Chicago, St. P., M. & O. R. Co.*, (Wis.) 6 Am. & Eng. R. Cas., N. S., 50, and *foot-note*.

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in any other county than the one in which the cause so originated shall be utterly void. This section was codified from the act of 1892 (Acts 1892 p. 59), wherein it is further stipulated that, if the cause of action arise in a county where the railroad company has no agent, then suit may be brought in the county of the residence of the company. The precise question in the case is whether the act of 1892, requiring suits to be brought in the county where the injury occurred, and declaring a judgment rendered elsewhere to be utterly void, applies in this case. The plaintiff in error contends that it does. It is conceded that it is a foreign corporation, having its principal office in the state of South Carolina, and that the only county of Georgia in which it operates a railroad is Richmond county, and that there it has an office and does business. The language of the statute is "All railroad companies shall be sued in the county in which the cause of action originated." If the plaintiff in error is right in its contention, it must be because the general assembly has deprived of jurisdiction all courts other than those of the county in which the cause of action originated. If the act is meant to apply to foreign corporations, and to causes of action arising without this state, then the act of the legislature of Georgia would seem to fix in another state jurisdiction of the case in that state, because it says such companies shall be sued in the county in which the cause of action originated. If the words of the act are to be accepted literally, it would be held to go further, and require suit to be brought in that state in the county of the residence of the railroad corporation, if there was no agent in the county where the injury occurred; and we would thus give to the Georgia lawmakers extraterritorial jurisdiction. This view of the subject is referred to only to show that, if the provisions of the statute be held to apply to causes of action arising out of the state, then, by the words of the enactment, these consequences would follow. We do not, of course, undertake to say that the lawmaking power could not deny

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the jurisdiction of the courts of the state to a nonresident in an action to recover damages against a foreign corporation, domiciled here, for injuries occasioned in the state where the defendant resides. On the contrary, we do not doubt that such could be done. But we do hold that such is not done under the terms of the act, which not only deprives all other courts of jurisdiction of the subject-matter, but gives exclusive jurisdiction to the courts of the county where the injury was occasioned, if the defendant was represented by an agent there, and, if not, then in the county of the residence of the defendant. The legislative intent was not only to deprive certain courts of jurisdiction, but to fix it in others. If the act be so construed as to carry into effect the provision denying jurisdiction, it must end there, because in a case like that at bar the provision fixing the jurisdiction cannot be carried out, inasmuch as it would be extraterritorial legislation, and the effect would simply be to deprive our courts of all jurisdiction. Legislative authority is bounded by the territorial limits of the state (Cooley, Const. Lim. 128), and, necessarily, in the passage of the act of 1892 the legislative will was expressed as to suits against railroads in this state, and as to causes of action arising within this state. It undertook, as we construe its terms, to change existing law as to the venue of actions brought in this state against railroad companies, by compelling such suits to be instituted in that county of this state where the cause of action originated; but it did not have for its object closing the doors of our courts to plaintiffs having a cause of action which originated in another state against a company doing business in one of the counties of this state. As to the venue of such suits, the law as it stood prior to the passage of that act remains unchanged. As to the jurisdiction of the courts of Richmond county against the South Carolina Railroad Company prior to the passage of the act, see *Railroad Co. v. Nix*, 68 Ga. 572; and generally. *Railroad v. Swint*, 73 Ga. 651; *Williams v. Railway Co.*, 90 Ga. 519, 16 S. E. 303. Judgment affirmed.

St. Louis S. W. Ry. Co. v. Berger

ST. LOUIS S. W. RY. CO.

v.

BERGER.

(*Supreme Court of Arkansas, Jan. 22, 1898.*)

Assault on Passenger by Conductor—Evidence—Instruction.—Where it appeared from the evidence that defendant's conductor did use more force than was necessary to repel an assault upon him by a passenger, defendant could not complain that the question whether or not its conductor used more force than was necessary was left to the jury.

Same—Lawful Force.*—A conductor cannot lawfully use more force in repelling an assault upon him by a passenger than is necessary for his defense.

Same—Burden of Proof.—When a *prima facie* case of assault and battery by a conductor on a passenger is sought to be justified, it is incumbent upon the defendant railroad to show that its conductor used no more force than the exigencies of the case called for.

Remarks of Counsel.—In such action a judgment for plaintiff will not be reversed because of improper remarks by his counsel in the course of the arguments, where it appears improbable that the jury were misled by them.

APPEAL from Miller county circuit court. *Affirmed.*

Appellee filed his suit in the circuit court of Miller county, alleging that on June 4, 1894, while a passenger on the road of appellant, en route between Lewisville and Texarkana, the conductor of the train, Randall Silverman, cursed and abused him willfully, and did beat, bruise, and illtreat him, striking him with a lantern, by reason of which curses, blows, and illtreatment he was damaged in the sum of \$20,000. Appellant answered, denying that appellee was a passenger, and alleging that the wounds received by appellee at the hands of Randall Silverman were received in a personal encounter between himself and Silverman, for which appellee was alone responsible; that the altercation was brought about by appellee

Case Stated.

*See note at end of case.

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striking the conductor in the face ; that appellee's attack on the conductor was occasioned, not by a desire to protect himself, but originated in anger towards the conductor, because of the attempt of the said conductor to prevent him from making improper advances towards a young lady passenger on said train ; that the conductor, in defending himself and in striking appellee, acted, not as the agent of appellant, but in his own individual capacity, for which appellant is in no wise responsible. Upon trial, verdict was for appellee in the sum of \$700, for which judgment was rendered.

At the instance of appellee the court gave the following instructions : “(1) If the jury find, from a preponderance of the evidence in this case, that, as alleged in the complaint, plaintiff was on the 4th day of June, 1894, a passenger in a coach of defendant, being transported from Lewisville, Ark., to Texarkana, Ark., and that, while being so transported as a passenger by the defendant, without lawful cause, he was beaten and wounded by the conductor of the defendant in charge of said train, and said plaintiff thereby injured or damaged in any amount, then is plaintiff entitled to recover. (2) The fact that the plaintiff may have first struck said conductor would not excuse or justify said conductor in using against plaintiff any more force than sufficient to protect said conductor from said blow, or a repetition thereof, or from any further violence at the hands of plaintiff. (3) Though the jury should believe, from the evidenc, that plaintiff made the first assault upon the conductor on defendant's train, still, if they further believe, from the evidence, that the conductor so attacked repelled plaintiff's assault with more force and violence, and did more injury to plaintiff, than was reasonably necessary for his own protection from injury at the hands of plaintiff, then, as a matter of law, the conductor using such excessive force would be guilty of assault and battery ; and if, in this case, defendant seeks to justify the assault and battery committed by the conductor upon the plaintiff, if you find such an assault and battery was made, from the evi-

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dence, on the ground that plaintiff first assaulted the conductor, it is incumbent on the defendant to show that no more force was used than the exigencies of the case called for. The force used must be suitable in kind and reasonable in degree; otherwise, the justification fails. An assault by a passenger upon a conductor of a train will not justify the conductor in pursuing and punishing the passenger after the assault is over. If he does so, he makes the defendant liable for the injury. (4) If the jury believe, from the evidence, that the plaintiff was guilty of indecorous conduct towards the lady passenger, then it was the duty of the conductor of the train to use all necessary and reasonable means to protect her from insults or annoyance, but he would have no right to abuse or insult the plaintiff as a punishment for such conduct; the conductor's duty being only to prevent a continuation of such conduct by the use of all necessary and reasonable means. (6) The jury are instructed that the facts, if proven, that the plaintiff may have spoken the first word or made the first remark to the conductor on the defendant's train, and this word or remark so spoken by plaintiff brought on the difficulty, and caused the assault and battery which ensued, and the plaintiff struck the first blow, would not, of itself, excuse or justify said conductor in using against the plaintiff any more force than was reasonably necessary to protect him (said conductor) from said blow, or a repetition thereof, or from any further violence at the hands of plaintiff." To the giving of each of which the appellant separately excepted.

The appellant asked the court to give the following instructions: "(2) The jury are instructed that, while the defendant is responsible for the acts of its conductors, in their treatment of passengers, done in the line of their duty, in the scope of their authority, yet the conductor has the right to resent and resist an assault made on him by a passenger, or any one else, and his act in resisting or resenting such an assault is a personal act of the conductor, for which the principal (the

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defendant in this case) is not responsible. (3) If the jury find, from the evidence, that the assault of the defendant's conductor on the plaintiff was not malicious, and was not the result of a reckless disregard of plaintiff's rights as a passenger, but was occasioned by the assault of plaintiff on the conductor, and was made to repel and resent such assault, then the plaintiff is not entitled to recover any damages for the pain, suffering, or humiliation experienced by him, and your verdict should be for the defendant. (5) If the jury find, from the testimony, that the conductor in charge of the train on which plaintiff was a passenger did strike plaintiff and injure him, as claimed by plaintiff, and that in so doing he used more force than was necessary in order to repel any assault which may have been made on him by the plaintiff, or that he used more force than was necessary in order to prevent any improper interference with another passenger on the train by the plaintiff, and you also find that the unnecessary force and violence on the part of the conductor was done under excitement and in anger, occasioned by the assault of plaintiff, or by improper conduct of plaintiff towards another passenger, then plaintiff cannot recover, as against defendant, and your verdict will be for defendant. (6) If the jury find, from the testimony, that the plaintiff was a passenger on the defendant's railroad at the time and place claimed by him, and that he was beaten and bruised by the conductor of said train with a lantern, and that from the said beating and bruising the plaintiff has suffered physical pain, and may probably continue to suffer therefrom, and also experienced humiliation by reason thereof, and that said beating and bruising was caused by the act of plaintiff in slapping the said conductor's face, by which the said conductor was angered and excited, and while so angered and excited gave the blows with the lantern, then your verdict should be for the defendant, although you should find, from the testimony that the conductor used more force than was necessary to repel the assault made on him by the

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plaintiff." Of which the court amended instruction No. 3, by adding at the end thereof the words, "Unless you find that he used more force than was necessary to protect himself." The court gave No. 3, as amended and No. 4, and refused Nos. 2, 5, and 6. To the amending of said instruction No. 3 as aforesaid, and giving the same as amended, and to the refusal of the court to give each of said instructions Nos. 2, 5, and 6, appellant separately excepted.

Sam H. West and John T. Sifford, for appellant.
Scott & Jones, for appellee.

HUGHES, J. (after stating the facts). Briefly the case may be stated as follows: Appellee was a passenger on train of appellant. He was a New York jewelry drummer, and took a seat near a girl of 17 years, a stranger to him. The conductor removed this girl to the rear of the coach. Appellee said to a friend he would go back and see why the conductor moved this girl. He went back, sat down by the girl, and began inquiring where she was going, and asked her other questions. The conductor looked at him in a manner that convinced him that the conductor, to say the least, was suspicious of his intentions. From this an altercation ensued, in which appellee struck the conductor first, and in turn the conductor struck him, and beat him with a lantern. There was evidence tending to show that the conductor gave the appellee a serious and severe beating with his lantern, and that the appellee was endeavoring to ward off the blows, or protect himself by throwing up his hands; that the brakeman, while this was going on, stood behind the conductor, and twice, when the conductor ceased beating the plaintiff, told him to give him some more; and that thereupon the conductor hit him two more licks. To use his language, "I think he gave him some more twice." The evidence tended to show that the conductor only stopped beating the appellee because he discovered he was a Mason; that the conductor struck several blows,—as many as three to five each time; then he would talk to the plaintiff,

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and strike him again. The blows were upon the head and shoulders of the plaintiff, who tried to ward them off with his hands. Plaintiff's hat was knocked off, there was a scalp wound, and the blood ran over his face, hands, and clothing. Dr. Webster, who dressed the plaintiff's wounds, testified: "The wounds were on his head, left shoulder, and arms; two or three wounds on the head, his shoulder was pretty badly bruised, and finger pretty badly cut. One of the wounds on his head was about two and a half inches long, cut to the skull. The other one was cut to the skull, but was more of a puncture. It was probably one-half inch long. * * * The wound on his finger was quite a gash." On cross-examination he said, "I did not regard his wounds of a serious nature." There was other testimony tending to show that the beating was severe; in fact, very unnecessary to repel the force used by the appellee in slapping the conductor in the face, which, there is proof tending to show, was provoked by the conductor calling the appellee "a son of a bitch."

The appellant contends that by the instructions of the court it was left to the jury to decide whether or not the conductor used more force in repelling the assault of appellee than was necessary to protect himself, and that this was error; that the court should have instructed, as appellee asked, that if they found that the conductor used more force than appeared to him as necessary, acting as a reasonable man, under the circumstances and surroundings. Conceding that, as an abstract proposition, the contention is well founded, yet the refusal to so instruct in this case could not be prejudicial, as it is plain, from the testimony, that the conductor did use more force than was necessary to repel the assault of the appellee. If error, therefore, it is not prejudicial.

The appellant contends that, if the servant is justifiable, under the law, in what he did, the master is not

Assault on Passenger by Conductor—
Evidence—Instruction.

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liable. Very true. "When one is wrongfully assaulted, it is lawful to repel force by force (as also to use force in defense of those whom one is bound to protect, or for keeping the peace), provided that no unnecessary violence is used.

Same—Lawful
Force.

* * * We must be content to say that the resistance must not exceed the bounds of mere defense and prevention, or that the force used in defense must not be more than commensurate with that which provoked it." Webb, Pol. Torts, p. 255. We think the burden was on the appellant to show that the conductor used no more force than appeared to him, as a reasonable man, necessary to repel the assault of the appellee. This has not been done. On the contrary, it appears, from the evidence of the appellant, as well as that of the appellee, that the amount of force used by the conductor greatly exceeded that which would appear to any reasonable man to have been necessary to repel the assault made by the appellee upon the conductor by slapping him in the face with his hand.

The appellant also contends that, if the conductor did use more force than seemed to him necessary for his own protection, the appellant (the master) is not liable in damages. To support this contention, they cite *Peavy v. Banking Co.*, 81 Ga. 485, 8 S. E. 70 (in which no authority is cited to sustain the opinion), and *Harrison v. Fink*, 42 Fed. 787, a case originating in Georgia, to support which *Peavy v. Banking Co.* is cited. We cannot yield assent to such a doctrine, which is based upon the ground that the injured party is the aggressor or brings on the difficulty. This would exempt a railroad company from liability in a case where, for a simple assault upon a servant, representing the company, the servant might severely and cruelly beat the assailant, a passenger, whom the law makes it his duty not to abuse or mistreat unnecessarily. The rule applicable to such cases is this: That when a *prima facie* case of assault and battery is sought to be justified, it is incumbent upon one who justifies to show that no more force was used

Same—Burden of
Proof.

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than the exigencies of the case called for. The force used must be suitable in kind and degree to the exigencies of the occasion; otherwise, the justification fails, *Hanson v. Railway Co.*, 62 Me. 84; *Dillingham v. Anthony* (Tex. Sup.) 11 S. W. 139.

There are objections based on language used in argument by appellee's counsel, which was, perhaps, not altogether proper, but we think the case ought not to be reversed on account of it. We do not think it probable that the jury was misled or prejudiced by it. We cannot say that there was an abuse of discretion by the trial court. The verdict was \$700 actual damages, which we do not think excessive. Upon the whole case, finding no reversible error, the judgment is affirmed.

Remarks of Counsel.

BUNN, C.J.(dissenting). The statement of the facts in this case, as detailed by the young lady involved, presents the plaintiff in a very different attitude from that in which his own testimony presents him, and the conductor's testimony puts quite a different phase on his use of unnecessary force to repel the assault from that made to appear in plaintiff's testimony. But, since no testimony, antecedent to the assault on the conductor by the plaintiff, ought to have any influence upon our decision on the question raised by the instructions, called in question, and since, in discussing those instructions, it must be conceded, for the sake of the argument, at least, that there was unnecessary force employed by the conductor in repelling the assault upon himself by the passenger, I forbear to make any particular statement of the facts.

The question at issue arises upon instructions given and instructions refused and instructions modified, and, briefly stated, is this : "where a passenger assaults the conductor of the train in which he is traveling, and the latter, in resenting, uses more force than is necessary to repel the assault, is the company liable for damages occasioned by the employment of the excessive force?" The authorities cited by a majority of the court in support of their view of the question

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involved, are Webb, Pol. Torts, pp. 255, 256, *Hanson v. Railway Co.*, 62 Me. 84, and *Dillingham v. Anthony* (Tex. Sup.) 11 S. W. 139; and these I will endeavor to analyze and discuss in the order named.

In the first,—a text-book,—under the side heading of “Self-Defense,” it is stated: “When one is wrongfully assaulted, it is lawful to repel force by force (as also to use force in the defense of those whom one is bound to protect, or for keeping the peace), provided that no unnecessary violence is used. How much force and of what kind, it is reasonable and proper to use in the circumstances, must always be a question of fact; and as it is incapable of being concluded beforehand by authority, so we do not find any decisions which attempt a definition. We must be content to say that the resistance must “not exceed the bounds of mere prevention,” or that the force used in defense must be not more than “commensurate” with that which provoked it. It is obvious, however, that the matter is of much graver importance in criminal than in civil law. It is generally held that the rule on the subject is not exactly the same in civil as in criminal actions, and the statement of the author is but the statement of the rule in criminal actions. Moreover, the rule as stated only reaches the direct and immediate actor, and has nothing to say as to the duty or liability of a third party, holding, for instance, the relation of master or employer to the prime actor. The authority, therefore, is not applicable to the case in issue, and it states nothing that is inconsistent with what I have to say, or with the authorities I shall take occasion to cite.

Hanson v. Railway Co., *supra*, was a case where a brakeman was attempting to put off the coach a dog belonging to the plaintiff, a passenger; it being against the rules to carry dogs on the coach. The brakeman attempted, in rather a rude and uncereemonious manner, to put the dog off, and this gave rise to a difficulty between the plaintiff and the brakeman, in which the former rather rudely pushed the latter down into a seat, and the latter, stretching out his legs, kicked the

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plaintiff, breaking the pane of glass behind him in doing so, but failed to release himself by so doing from the grasp of the former. When the plaintiff had finally released the brakeman, under promise that the latter should behave himself, and while the plaintiff's back was turned, the brakeman struck him severe blows with a poker about the head and shoulders and over the eye, which constituted the assault and battery for which the suit was brought. In that case the court said: "If, therefore, it be true, as defendants contend, that the plaintiff was the aggressor,—that he first assaulted the brakeman, and resisted him in the performance of a legitimate duty,—it was still a question of fact, for the jury to determine, whether the brakeman did not use greater violence than the exigencies of the case demanded, and whether he did not pursue the plaintiff, and inflict the blows upon his head with the iron poker, after the latter had ceased his assault, had ceased his resistance, and was returning to his seat with his back to the brakeman." In that case the servant was within the line of his employment and duty in attempting to put the dog off the coach. In doing so he became involved in difficulty with the plaintiff,—the owner of the dog,—which at first extended no further than the act of plaintiff in pushing or pulling the brakeman down into his seat, and the latter's kicking the former by stretching out his legs, or in the act of so doing, for the record is not clear on that point. The scuffle seems to have ended at this point, on the plaintiff's promise to the brakeman that he would let him up if he would afterwards behave himself, which agreement the brakeman assented to and was released; but, as soon as he could slyly do so, he seized the iron poker, and badly beat the plaintiff. The first difficulty having closed, the brakeman became the aggressor and assaulting party in the latter. Whatever name the court may employ to designate this character of assault on the part of the servant, it was not in self-defense, and therefore it was done while in the line of his employment, and done in vio-

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lation of his and his master's duty to the passenger. And such was the theory upon which the court decided the case. We have no quarrel with the decision on the facts of the case, however wanting in precision its language may be.

In *Dillingham v. Anthony* (Tex. Sup.) 11 S. W. 139, *supra*, the much-mooted question was whether or not the malicious and willful assault of a conductor upon one of his passengers, in a personal controversy between the two, disconnected from any duty of the conductor as such, rendered the railway company liable. The court held the company liable upon the facts of that case, but not for exemplary damages. It was manifest that the court took the side of the long-standing controversy to the effect that the malice and willfulness of the servant in making an assault upon the passenger did not excuse the master from liability, since the latter owed a duty to the passenger, that of protection, which, through his servant, he had violated. I have no desire to enter upon that threadbare discussion, since the question is not presented in this record.

In *Harrison v. Fink*, 42 Fed. 787, the doctrines of which the court repudiates, as well as *Peavy v. Banking Co.*, 81 Ga. 485, 8 S. E. 70, upon which it is founded, the court said, quoting from *Peavy v. Banking Co.*: "Did he [the plaintiff] have a cause of action for the shooting? But for his fault, the conductor would not have been brought into a state of excitement, from danger and insult, which unfitted him for discharging his proper duties, either to the company or the passenger. Whether the conductor was more or less in fault than the plaintiff was in shooting, certainly the plaintiff was more in fault than the company, because the plaintiff was there upon the ground, stirring up excitement, and bringing on danger both to the conductor and himself. He unfitted the conductor for exercising the care and prudence that were essential to guarding the interests of the company, and essential to performing in a proper manner his duty to the company or to the plaintiff. The plaintiff spoiled the

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instrument, and then sued the manager because the performer did not make good music. It was the plaintiff's fault that the conductor was out of time, and, though the conductor might not be altogether excusable for the shooting (according to his own evidence, however, he was excusable), the company was not in fault for it; and it would be unjust for the plaintiff to recover of the company, when he boarded its train, violating the law, as we can well infer, by carrying upon his person a concealed weapon, violating the law again by swearing and using obscene language, violating the law again by committing an assault upon the conductor with a pistol, drawing the pistol, and presenting it at him, and violating the law by general disorder and misconduct throughout the transaction, up to the moment he was shot." And continuing, the federal court said: "This quotation expresses very clearly, in our opinion, the correct rule on the subject."

Why the doctrine asserted in those cases failed to receive the sanction of the majority we do not see; for it is a doctrine now generally held, I believe, that a passenger who so acts as to disqualify a servant from properly performing his duty to his master and to the public, by assaulting him and causing him to resort to whatever present means of self-defense he may have, ought not to be heard to complain of the consequences. This is the doctrine held in *Railway Co. v. Shropshire*, 28 S. E. 508, in which Judge Lumpkin, speaking for the supreme court of Georgia, said: "One who voluntarily, and by his own misconduct, places it beyond the power of a master to protect him (that is, by disqualifying his servant) surely cannot complain of an omission so to do." The same principle is announced in *Scott v. Railway Co.*, 53 Hun, 414, 6 N. Y. Supp. 382. This last case is authority for saying that, while in criminal law words do not justify an assault, so far as the party making an assault is concerned, there is no reason for holding that the carrier should be held responsible when a passenger, by his own improper and insulting

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behavior while a passenger on the road of the railroad company, brought upon himself an assault.

I come now to consider what will be regarded as conduct not within the line of his employment on the part of a servant. Some of the cases already cited throw light on this question, but it may be well to consider others. In *Railroad Co. v. Wetmore*, 19 Ohio St. 133, the supreme court of Ohio said: "The evidence of the company on the trial tended strongly to prove that the plaintiff, by his importunate conduct and abusive language towards the servant, provoked a personal quarrel between them; that the assault was the result of this quarrel; and that the blow was inflicted by the servant as an act of personal resentment. If these facts had been found by the jury, the wrongful act of the servant in striking the plaintiff could not be regarded as authorized by the master, nor as an act done by the servant in the execution of the service for which he was engaged by the master. The fact that the blow was inflicted with a hatchet furnished by the master to be used for a wholly different purpose, though in connection with the servant's business, was wholly immaterial, as respects the liability of the master. If he would not otherwise have been liable for the assault, the fact that it was committed with his hatchet did not contribute to make him so." In *Railroad Co. v. Jopes*, 142 U. S. 25, 12 Sup. Ct. 111, the supreme court of the United States, after discussing the rule which governs in cases where a conductor removes a passenger from the coach for misconduct, goes on to say: "But, if an employe may use force to protect other passengers, so he may use force to protect himself. He has not forfeited his right of self-defence by assuming service with a common carrier, nor does the common carrier engage aught against the exercise of that right by his employe. There is no misconduct when a conductor uses force and does injury in simply self-defense; and the rules which determine what is self-defense are of universal application, and are not affected by the character of the employment in which the party is engaged.

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Indeed, while the courts hold that the liability of a common carrier to his passengers for assaults of his employes, is of a most stringent character, far greater than that of ordinary employers for the action of their employes, yet they all limit the liability to cases in which the assault and injury are wrongful." The idea is that, where the servant leaves the line of his employment to attend to his own affair,—defend himself against the assault of a passenger,—he is, nevertheless, doing a lawful act, and neither he nor his master is liable. In *Railroad Co. v. Wetmore*, *supra*, in speaking of the master's responsibility for the acts of the servant, the court said: "But, to make the master responsible, the act of the servant must be done in the course of his employment; that is, under the express or implied authority of the master. Beyond the scope of his employment, the servant is as much a stranger to his master as any third person, and the act of the servant, not done in the execution of the service for which he was engaged, cannot be regarded as the act of the master."

It is impossible to get the full force of this decision by mere quotations and making extracts therefrom. Nor is it possible to do so in any case. I can only invite the reader to an examination of the cases I have cited and merely made quotations and extracts from, and I feel confident that, without a jar or discordant note anywhere, they all amply sustain the doctrine that lawful self-defense on the part of the conductor entails no liability upon him, and, of course, none upon the company; that such defense as its definition implies is a matter personal to himself, and is something he neither engages to make or not to make in whatever employment he may enter; that it is therefore not within any employment he may make, being a natural right which he can neither surrender, nor gratify by any contractual act; and that, in making a self-defense, he is not directed or influenced in the same by any lawful engagement whatever with another. If the servant, by lawful assault, in response to an assault upon his own person, is not within the line of employment

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to any master, can it be said that continuing his defense to the extent of using more and greater force than is necessary to repel the assault and force his antagonist to desist, will have the effect of bringing him back into the line of his employment. The absurdity of such a proposition renders a discussion of it more or less insulting to even the most generous and patient reader. All the cases in which the master has been held liable for the use of excessive force by the servant are cases where the servant was acting in the line of his duty to and employment by the master, and most frequently illustrating the conduct of conductors and other servants in putting off the train passengers and others who refuse to pay fare, or are guilty of misconduct such as renders them liable to be put off; for the ejecting of disorderly persons is one of the express duties of the conductor, not only to the railroad company, but to the public and to the law of the land.

WOOD, J., concurs in the dissenting opinion.

NOTES.

Assault—Lawful Force.—The general rule is that a person acting on the defensive is entitled to use as much force as he reasonably believes to be necessary to protect himself. *State v. Brooks*, 99 Mo. 137. See also *State v. Scott*, 24 Kan. 68.

But the force employed must not be out of proportion to the apparent urgency of the occasion. If the person assaulted uses excessive force beyond what is necessary for self-defense, then he is himself guilty of assault and battery.

England.—*Rex v. Whalley*, 7 C. & P. 245, 32 E. C. L. 502; *Reg. v. Mabel*, 9 C. & P. 474, 38 E. C. L. 189.

Delaware.—*Hazel v. Clark*, 3 Harr. (Del.) 22.

Illinois.—*Trogden v. Henn*, 85 Ill. 237; *Ogden v. Claycomb*, 52 Ill. 365; *Gizler v. Witzel*, 82 Ill. 322.

Indiana.—*Philbrick v. Foster*, 4 Ind. 442.

Maine.—*Rogers v. Waite*, 44 Me. 275.

Massachusetts.—*Com. v. Ford*, 5 Gray (Mass.) 475; *Tyson v. Booth*, 100 Mass. 258.

Michigan.—*Ayres v. Birtch*, 35 Mich. 501.

Minnesota.—*Gallagher v. State*, 3 Minn. 270.

New Hampshire.—*Dole v. Erskine*, 35 N. H. 503.

New York.—*Elliott v. Brown*, 2 Wend. (N. Y.) 497; *Scribner v. Beach*, 4 Den. (N. Y.) 448, 47 Am. Dec. 265.

Pennsylvania.—*Com. v. Ellenger*, 1 Brews. (Pa.) 352.

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Texas.—Cotton *v.* State, 4 Tex. 260.

Vermont.—Bartlett *v.* Churchill, 24 Vt. 218. See also Seymour *v.* Bailey, 76 Ga. 338; Brown *v.* Gordon, 1 Gray (Mass.) 182.

The rule on this point is well laid down by a writer on Scotch law: "Though fully justified in repelling the party, he is not to carry his resentment to such a length as to become the assailant in his turn, as by continuing to beat the aggressor after he has been disabled or has submitted, or by using a lethal or ponderous weapon, as a knife, poker, hatchet, or hammer, against a fist or cane, or, in general, pushing his advantage in point of strength or weapon to the utmost. In such cases, the defense degenerates into aggression, and the original assailant is entitled to demand punishment for the new assault committed on him after his original attack has been duly chastised." Alison Prin. Crim. Law of Scot. 177.

A trespasser on a train is not justified in shooting a servant of the railroad company who attempts to put him off, when he can with safety get off and avoid the shooting. People *v.* Douglass, 87 Cal. 281.

It is a question for the jury to decide whether the force used in repelling an attack was moderate and appropriate under the circumstances. Cannon *v.* State, 80 Ga. 758; Schnier *v.* People, 23 Ill. 17; Barnes *v.* Gray, 5 Har. & J. (Md.) 436; Com. *v.* Bush, 112 Mass. 280; Tyson *v.* Booth, 100 Mass. 258; Kent *v.* Cole, 84 Mich. 579; State *v.* Stockton, 61 Mo. 382; State *v.* Alley, 68 Mo. 124; Gallagher *v.* State, 3 Minn. 270; State *v.* Dixon, 75 N. Car. 275; Edwards *v.* Leavitt, 46 Vt. 126. See also Com. *v.* Goodwin, 3 Cush. (Mass.) 154; Brown *v.* Gordon, 1 Gray (Mass.) 182; Hanson *v.* European, etc., R. Co., 62 Me. 84, 16 Am. Rep. 404.

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(*Supreme Court of Georgia, May 21, 1897.*)

Carriers of Passengers—Failure to Stop at Destination—Damages.*—In an action instituted for the recovery of damages for the commission of a mere negligent tort, which involves no actual physical invasion of one's rights of person or property, but which consists in the omission to perform a private duty springing out of the relation of carrier and passenger, the breach of which results in damage to the person to whom that duty is owing, the law of trespass is not involved; and it is therefore error in such a case for the trial judge to give in charge to the jury that portion of section 3906 of the Civil Code which provides as follows, "either to deter the

*See note at end of case.

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wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff;" but upon the trial of such a case it is proper to give in charge to the jury that portion of the section of the Code above referred to which precedes the words above quoted.

Same—Instructions.—Other than as above indicated, no error was committed by the judge at the trial.

(Syllabus by the Court.)

ERROR by defendant from superior court, Gordon county. *Reversed.*

The official report is as follows :

Arnetis Hardin sued the Southern Railway Company for \$1,000 damages, alleging : On December 22, 1894, petitioner purchased from the defendant, in Piedmont, Ala., a ticket entitling her to be carried from that place to Reeves Station, a point on the defendant's line of road in Gordon county, Ga. In accordance with said contract, defendant received her on board of its car, and faithfully undertook and promised to carry her to said Reeves Station, and there safely deliver her ; but in violation of its said undertaking, and against her wish and protest, the defendant, through its agents and servants, willfully, wrongfully, and tortiously carried her past said Reeves Station two miles. She is now old and feeble, being in her sixty-fifth year. When said train arrived at Oostanaula, the train stopped only a very short time ; and she was forced and hurried by defendants servants off said car, unaided and unassisted by the conductor or servants of defendant, and in getting off the car unassisted, received injuries in her side, back, and arm, which caused her great pain and suffering for many days ; she suffered greatly from fatigue, and was made sick and sore by exertion,—all of which was caused by the negligence of the defendant and its agents. Said wrongs and injuries and grievances, as aforesaid, committed upon her by the defendant, were done without the fault of petitioner, but were caused by the negligence and wrongdoings of the defendant, its agents and employes. She was put off the cars at night, and was forced to stay all night among strangers ; and in getting

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home the next day, she had to travel several miles further than she would have had to travel if defendant had put her off, as it agreed and promised to do, at Reeves Station, where petitioner had a comfortable conveyance to carry her home that evening. For her said wrongs and injuries, she is entitled to, and claims, the sum aforesaid.

On the trial of the case the jury rendered a verdict in favor of plaintiff for \$300. The defendant made a motion for a new trial, which was overruled, and it excepted. The grounds of the motion for a new trial were: Because the verdict is contrary to law, evidence, etc., and is excessive. Because the court refused to withdraw from the jury, upon motion of defendant's counsel at the commencement of plaintiff's evidence the question as to whether plaintiff was injured in alighting from the train, as alleged in the fourth paragraph of her petition. "Movant insists that this motion should have been granted, the petition setting out two distinct causes of action,—one, a breach of the contract to convey plaintiff to Reeves Station, and safely deliver her there, the other being an alleged injury caused by negligence of defendant's agents in failing to assist plaintiff to alight from the train; the evidence showing, as defendant insists, that ample time was allowed plaintiff to disembark, and that of her own choice she chose to assist herself declining all assistance, that she failed to observe the light provided to light the steps and ground upon which she alighted, and fails to show that there was anything about plaintiff which suggested to defendant's agents that special assistance was needed by plaintiff." Because the court erred in charging the jury: "In every tort there may be aggravating circumstances, either in the act or the intention; and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff;" and the court further erred in adding, in immediate connection with the foregoing, the following: "Look to the evidence, and find the facts, and say

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whether or not there was any bad faith or willful misconduct on the part of the officers or agents of the company at the time she alighted from the train. If you find there was any willful violation of the contract or any bad faith on the part of the officers of and agents of the company, either in act or intention, why, then, she would be entitled to recover punitive damages." Movant insists that it was error to give any part of the two clauses of the charge above quoted to the jury; that there was no evidence to authorize or require such charge, or any charge, in regard to punitive damages. There was no evidence that defendant's officers on the train treated plaintiff with any indignity, or otherwise than with politeness and civility, or that they treated her otherwise while she was disembarking from the train; no wanton or willful violation of the contract. Defendant's conductor informed plaintiff's escort (son) that he was sorry he could not stop the train; that it was against his orders (this according to the son's testimony). The conductor testified that he did not decline to stop the train, but made an effort to do so, but failed, on account of failing to reach the engineer by the usual signal, because some part of the air pipe was slightly obstructed. Movant insists that these charges complained of injured the defendant.

The following appeared from the evidence: The plaintiff's son purchased at Piedmont, Ala., on December 22, 1894, a ticket from that place to Reeves Station, Ga., upon which the plaintiff took passage on the defendant's train, accompanied by her son and daughter. On arriving at Rome, the party remained there some hours, and then took a train of defendant's railroad, which would pass Reeves Station. According to the testimony of the plaintiff's son, he handed the tickets to the conductor on the latter train, and the conductor said there was no station there, and wanted to know who sold the tickets. The witness replied, "The agent at Piedmont." The conductor then said: "He made a mistake. There is no station there." Witness pleaded with him to let them off at Reeves Station, but the

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conductor did not do so. He told witness that he could not stop there. They were carried beyond Reeves Station, to Oostanaula, which one of the plaintiff's witnesses testified, was two miles, and, another, four miles, from Reeves Station. At Oostanaula they got off. No one came to help them off. The plaintiff was 65 years old, but, according to the testimony of her son, as well as that of the conductor, she was a healthy-looking woman, with nothing about her appearance to indicate that she needed special assistance. No one asked for such assistance. As they were getting off, a man with a uniform was holding a light at the place where they got off, which lighted up the steps and the ground around the steps. The plaintiff's son testified that a flagman or porter, who had called the station, was standing there, saying, "Hurry! hurry!" He did not offer to assist the plaintiff when she was getting off the car. As she was getting off, holding to the rail, the light blinded her some. She could not see well anyway, and she stepped off quickly, and got hurt. The plaintiff, in testifying as to the manner in which she was hurt, said: "I was helping myself. I chose to do that in getting off the train. The light * * * bothered me a little, and I thought I would hurry. I started to fall, and caught my whole weight, to keep me from coming headlong down; and it hurt, and hurts yet. I just started to fall, and it was so quick I reckon I must have missed the step. * * * I think I did. I just thought I would hurry, as all were in a hurry." "I thought I was getting along very well, and I was if I had not made a blunder." "My arm was hurt plumb down from the shoulder. I can't do any hard work. The worst hurt was about the elbow and about the top of the shoulder. Dr. Dudley sent me some liniment that helped it. It continued to pain me for five or six weeks. At times it hurts me yet. At times I can't do up my hair. My arm is stiff. It stills pains me every time I put my hands behind to raise my head." The train stopped long enough for all of the party and another person to get off safely. According to the testimony

of the conductor, the flagman, the defendant's master of trains, and the station agent, the train stopped at least two or three minutes, which the conductor stated was longer than it usually did, there being several heavy pieces of baggage to be taken from it there. All the baggage had not been loaded when plaintiff got off the train. It is usual to hurry passengers at stations. The time at which the train stopped at Oostanaula was about 5 o'clock in the evening. After the plaintiff and those who were with her got off the train, her son asked the station agent of the defendant if she could stay at the agent's home until he went to Reeves Station for a conveyance; and the agent said they could walk back to Reeves. The plaintiff's son replied that his mother could not walk the trestle in the dark. The plaintiff testified that the agent said she could walk the railroad bridge. They started off from the station and walked about half a mile, when they met a son of the plaintiff who was coming for them with a vehicle. He had gone to Reeves Station to meet them, and carry them home. The plaintiff's home was several miles from Reeves Station. The plaintiff did not go home with her son that night, however, but spent the night at a residence about half a mile from Oostanaula. The next morning her son took her home in a conveyance. Her lodging that night and her trip home cost her nothing. The train on which the plaintiff was a passenger was a through train, not scheduled to stop at Reeves Station; but it sometimes did stop there. There were other trains that stop there daily. The conductor, in his testimony, denied that he refused to stop the train at that station for the plaintiff. He testified that he always stopped there when there were passengers for that place, and intended to do so on this occasion, and made an effort to do so. He tried twice to blow the signal for the engineer to stop. When he first signaled, it was a mile before Reeves Station was reached. The engineer did not get the signal, however, the reason being, he supposed, that the conductor's valve was stopped up with dust and cinders. Sometimes dust or

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small cinders would get in the pipe when it was being put together, or would work in there and obstruct the air. The engineer having failed to respond, he went forward to another car, and gave the signal, to which the engineer responded, but they had then passed Reeves. The engineer testified that he took the latter signal to mean for him to stop at the next station after passing Reeves, and he did not stop until he reached Oostanaula. It would have been dangerous to have attempted to back the train to Reeves without first sending a flagman back a mile the other side of Reeves, and another a half mile ahead, to prevent possible collision with other trains. If he had heard the first signal, he could have stopped at Reeves. The conductor stated that the reason he did not give the signal sooner was that he was busy "working" the train, which was crowded; that he had to take down memoranda of coupon tickets; and the train was running 35 or 40 miles an hour.

McCutchen & Shumate and *Shumate & Maddox*, for plaintiff in error.

W. J. Cantrell & Son and *R. J. & J. McCamy*, for defendant in error.

ATKINSON, J. 1. Complaint is made that the court erred in charging the jury section 3906 of the Civil Code, which provides as follows: "In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff." Special stress is laid upon the proposition that the court should not have given in charge to the jury the concluding clauses of that section, to the effect that they might give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff; and this brings us to consider whether, for a tort committed against a person which involves a

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mere negligent omission upon the part of a carrier to perform a contract of passenger carriage, whereby a passenger is exposed to inconvenience and other damage, there being no actual physical invasion of any personal or property right, that portion of the section of the Code above referred to, and of which complaint is made, has any application, or whether it should be given in charge to the jury. We think an analysis of the section of the Code above quoted will show that it can have no application to the class of cases to which we have above referred. It cannot in any just sense be said that a mere negligent omission upon the part of a carrier to stop its train at a given point, to which it has undertaken to transport a passenger, is a trespass against such passenger. The word "trespass" embraces only that class of torts which involves a violent, unlawful, physical invasion of one's right of person or property ; and this classification necessarily excludes those acts of one person resulting in injury to another which arises from a mere omission to perform a duty imposed upon the party bound to perform by the terms of a contract entered into between them. If, then, the injury complained of consists of a mere omission to perform such a duty, it cannot, in any just sense, be said that the person complained against has committed a trespass upon the person of the other ; and, if no trespass has been committed, surely the court is not authorized to give in charge a provision of the law which is designed to authorize the imposition of additional damages by way of deterring the wrongdoer from the commission of a trespass only. There are cases of expulsion from railroad trains which involve, not only the breach of the contract of passenger carriage, but likewise the unlawful invasion of the personal rights of the passenger in forcibly expelling him from the train. Such was the case of *Head v. Railway Co.*, 79 Ga. 358, 7 S. E. 217 ; and in such a case it is entirely proper for the court to give in charge to the jury, not only that portion of the section of the Code above referred to which authorizes the jury to assess additional

Note

damages to deter the wrongdoer from repeating the trespass, but likewise authorizes them to give additional damages as compensation for the wounded feelings of the plaintiff. The facts of the present case, if the testimony of the plaintiff is to be believed, —and this we take as true,—the jury having found in her favor, make a case of a mere negligent omission properly to perform the contract of passenger carriage, resulting in inconvenience to the passenger, and in personal injuries received by her in attempting to alight from the train. The acts of the defendant were acts of omission only. No trespass, in a legal sense, was committed upon the person of the plaintiff; and we are therefore fully persuaded that the instruction given to the jury by the trial judge which is above criticised was entirely unwarranted by the evidence.

2. Other than as above indicated, no error of law appears to have been committed upon the trial; but the error above complained of bears directly upon the pivotal question in the case, and we are therefore constrained to direct that the case be tried again. Judgment reversed.

Same—Instructions.

NOTE

Carriers of passengers—Simple Negligence—Exemplary Damages.—In an action for personal injuries alleged to have been caused by negligence on the part of the defendant, exemplary or vindictive damages cannot be allowed for any want of care less than gross negligence. *Patterson v. South & N. Ala. R. Co.*, 318, 7 So. Rep. 437.

Where there is no evidence of wanton and malicious or gross and outrageous conduct on the part of the company or its agents, actual damage is all a plaintiff, injured by the negligence of the company, can recover for, and the allowance of exemplary damages would be improper. *Baltimore & O. R. Co. v. Breinig*, 25 Md. 378, *Louisville & N. R. Co. v. Hall*, 39 Am. & Eng. R. Cas. 298, 87 Ala. 708, 4 L. R. A. 710, 6 So. Rep. 277. *Columbus & W. R. Co. v. Bridges*, 38 Am. & Eng. R. Cas. 136, 86 Ala. 448, 5 So. Rep. 864.

Punitive damages cannot be given for mere negligence. *Louisville, N. A. & C. R. Co. v. Shanks*, 19 Am. & Eng. R. Cas. 28, 94 Ind. 598. *Richmond & D. R. Co. v. Vance*, 93 Ala. 144, 9 So. Rep. 574. *Kansas Pac. R. Co. v. Lundin*, 3 Colo. 94. *Purcell v. Richmond & D. R. Co.*, 108 N. Car. 414, 12 S. E. Rep. 954.

Note

As to Liability of Railroad Companies for Carrying Passengers Beyond Destination.—See *Houston & Texas Central Railroad Co. v. Smith et al.* (Texas) 2 Am. & Eng. R. Cas. N. S., 177 & a. 185 *et seq.*

Where the company has violated its contract with a passenger by carrying him beyond his destination, it is responsible in damages for the discomfort, inconvenience, sickness, expenses, and charges shown to have been the direct, natural, and proximate result of the breach of the contract. *International, etc., R. Co. v. Terry*, 62 Tex. 380, 50 Am. Rep. 529, 21 Am. & Eng. R. Cas. 323; *East Tennessee, etc., R. Co. v. Lockheart*, 79 Ala. 315; *Alabama G. S. R. Co. v. Sellers*, 93 Ala. 9, 30 Am. St. Rep. 17; *Texas, etc., R. Co. v. Pollard*, 2 Tex. App. Civ. Cas., § 481.

Inconvenience.—In an action against a carrier by a passenger who has been carried beyond his destination, the plaintiff is entitled to recover damages for his trouble and inconvenience in getting back to his destination. *East Tennessee, etc., R. Co. v. Lockheart*, 79 Ala. 315; *Alabama G. S. R. Co. v. Sellers*, 93 Ala. 9, 30 Am. St. Rep. 17; *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147, 62 Am. Dec. 323; *Trigg v. St. Louis, etc., R. Co.*, 74 Mo. 147, 41 Am. Rep. 305, 6 Am. & Eng. R. Cas. 345; *Cincinnati, etc., R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179.

Sickness.—A passenger who has been carried beyond his destination, and, without being able to procure a conveyance, and acting with prudence and care, walks back, is entitled to damages for sickness resulting from the walk. *Cincinnati, etc., R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179; *East Tennessee, etc., R. Co. v. Lockheart*, 79 Ala. 315; *Mobile, etc., R. Co. v. McArthur*, 43 Miss. 180; *Texas, etc., R. Co. v. Pollard*, 2 Tex. App. Civ. Cas., § 481; *International, etc., R. Co. v. Terry*, 62 Tex. 380, 50 Am. Rep. 529.

But not when the sickness results from the passenger's own negligence or imprudence in undertaking the walk without endeavoring first to find shelter, or where the walk is unnecessarily taken. *Texas, etc., R. Co. v. Cole*, 66 Tex. 562; *Gulf, etc., R. Co. v. Head*, (Tex. App. 1891) 15 S. W. Rep. 504; *Ohio, etc., R. Co. v. Burrow*, 32 Ill. App. 161.

Injury.—So where the passenger is compelled to walk to his destination, and in doing so sustains a personal injury by reason of some danger encountered, the existence of which is known to the carrier, he is entitled to have such injury considered as an element of damages, provided it is the proximate result of the carrier's wrong, and not attributable to the passenger's negligence or other independent cause distinct from the wrong. *Stutz v. Chicago, etc., R. Co.*, 73 Wis. 147, 9 Am. St. Rep. 769; *Winkler v. St. Louis, etc., R. Co.*, 21 Mo. App. 99; *Kreuziger v. Chicago, etc., R. Co.* 73 Wis. 158; *Evans v. St. Louis, etc., R. Co.*, 11 Mo. App. 463.

But where the injury is caused by the passenger's own negligence or imprudence he cannot recover. *Lewis v. Flint, etc., R. Co.*, 54 Mich. 55, 52 Am. Rep. 790; *Henry v. St. Louis, etc., R. Co.*, 76 Mo. 288, 43, Am. Rep. 762; *Winkler v. St. Louis, etc., R. Co.*, 21 Mo. App. 99; *Kreuziger v. Chicago, etc., R. Co.*, 83 Wis. 158.

Fright.—In *East Tennessee, etc., R. Co. v. Lockheart*, 79 Ala. 315, the plaintiff, a young girl about eight years of age, was carried a mile beyond her destination and put off at a place with which she was not familiar, and from which she was compelled to walk back to the station. It was held that the fright of the plaintiff, directly

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produced by the wrongful act, in addition to the trouble, inconvenience, peril, and fatigue, was an element of damage proper to be considered by the jury. And see *Cincinnati, etc., R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179.

Mental Anxiety.—A passenger who is carried beyond her station by the negligence of the company, but without any circumstances of aggravation, and without receiving any personal injury, may recover compensation for the inconvenience, loss of time, labor, and expense of traveling back, but not for anxiety and suspense of mind suffered in consequence of the delay, nor the effects upon her health, nor the danger to which she was exposed in consequence of the train being stopped at her station an insufficient length of time to enable her to get off. *Trigg v. St. Louis, etc., R. Co.*, 74 Mo. 147, 41 Am. Rep. 305, 6 Am. & Eng. R. Cas. 345.

And where a passenger was carried beyond his station, it was held that he could not recover for anxiety occasioned by the separation from his family. *Dorrah v. Illinois Cent. R. Co.*, 65 Miss. 14 7 Am. St. Rep. 629, 30 Am. & Eng. R. Cas. 576.

 HEYWARD

v.

BOSTON & A. R. Co.

(*Supreme Judicial Court of Massachusetts, Nov. 24, 1897.*)

Injury to Passenger on Freight Train—Liability of Railroad Companies.*—The plaintiff, wishing to attend to his horse on the trip, paid for its transportation and his own on a freight train. *Held*, that the railroad company was not liable for an injury to him caused by the reasonable and customary management of such trains.

Same—Negligence.—To support his allegation of negligence on the part of defendant, there was only the plaintiff's own testimony that he was 70 years of age, and that as he was walking near the middle of the caboose, without having either of his hands upon anything, an unexpected and sudden movement of the freight car threw him down. *Held*, that a passenger on a freight train was chargeable with notice of the possibility of such movements, and there was no evidence of negligence on the part of defendant.

REPORT from Hampden county superior court.

J. B. Carroll and W. H. McClintock, for plaintiff.
Brooks & Hamilton, for defendant.

KNOWLTON, J. The contract between the plaintiff

*See note at end of case.

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and the defendant was made upon the assumption that the plaintiff or some one employed by him was to go upon the train to take care of the horse, and the price paid for the transportation was paid for the carriage of the attendant, as well as for that of the horse. Railroad Co. *v.* Lockwood, 17 Wall 357. The case differs materially from *Quimby v. Railroad Co.*, 150 Mass. 365, 23 N. E. 205, where the plaintiff was being carried gratuitously, and from *Hosmer v. Railroad Co.*, 156 Mass. 506, 31 N. E. 652, where the plaintiff was not in the relation of a passenger, but rather of one who had contracted for the privilege of carrying on a business for his own profit on the defendant's train. If we assume, in favor of the plaintiff, that his contract was void as against public policy in that part which purported to exempt the defendant from liability for the negligence of its servants (see *Doyle v. Railroad Co.*, 166 Mass. 492, 44 N. E., 611; *Railroad Co., v. Lockwood*, 17 Wall. 357), we come to the question whether there was any evidence of negligence on the part of the defendant. The plaintiff, by his contract, was not to ride upon a train adapted to the carrying of passengers. The writing signed by him contained this provision: "That whenever the person or persons accompanying said stock under this contract to take care of the same shall leave the caboose, and pass over or along the cars or track of said carrier or of connecting carriers, they shall do so at their own sole risk of personal injury from whatever cause; and neither the said carrier nor its connecting carriers shall be required to stop or start their trains or caboose at or from the depots or platforms, or to furnish lights for the accommodation or safety of the persons accompanying said stock to take care of the same under said contract." From the nature of the transaction, as well as from the express terms of the writing, the plaintiff well knew that the defendant was to run its train as freight trains usually are run, and that there would be many risks in going upon it to which persons on passenger trains are not exposed. He had often accompanied horses on

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freight trains, and he knew the usual movements of freight trains at stations, in stopping and starting and switching, and taking on and leaving off cars. He knew that there is often quite a jolt in connection with stopping or starting to one upon the rear car of a long freight train. He testified that he had experience of frequent stopping and starting on this trip before he reached Worcester. So far as this was reasonably incident to the running of the train, he took the risk of it when he made his contract. The defendant did not undertake to manage its train differently from usual because he was upon it.

We see no evidence that the defendant's servants did any thing for which they were culpable. When the plaintiff was about to get off the train a long way east of the station in Worcester, the brakeman very properly told him that that was not the place where he wanted to get off, and, when the train had started and stopped again, he repeated the warning. Afterwards he told him that they had reached the place where he wanted to alight. In giving him this information, he did not intimate that the train would wait there for the convenience of passengers. The plaintiff had reason to know that the brakeman had not communicated with the engineer or conductor in regard to any special mode of managing the train for the plaintiff's safety or convenience, and that the train was liable to be started in either direction at any moment. There was no negligence on the part of the brakeman in telling the plaintiff that they had reached the place where he wanted to alight, inasmuch as it was fairly implied that the plaintiff was to look out for his own safety in attempting to alight.

Nor is there any evidence of negligence on the part of the engineer or conductor in moving the train at that point, for there is nothing to show that either of them was aware that the movement would be attended with any special risk to the plaintiff. Indeed the plaintiff, in his specification of the negligence relied on, which is made a part of the pleadings, does not allege

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any negligence in this particular, but charges as the only negligence relied upon that the train was stopped and started in a sudden and violent manner. To support this allegation, there is nothing but his own testimony that he was 70 years of age, and that as he was walking near the middle of the caboose, without having either of his hands upon anything, an unexpected and sudden movement of the car threw him down. In this fact alone we do not discover any evidence that the movement was different from that which often occurs at the end of a long freight train, without the fault of the engineer or conductor. We are of opinion that there was no evidence of negligence on the part of the defendant. Judgment on the verdict.

Same—Negligence.

NOTE.

Passengers on Freight Trains—Assumption of Increased Risks by passenger.—A passenger on a freight train cannot require the safeguards against danger to which passengers upon trains devoted to passenger service are entitled, but he accepts the accommodations provided subject to all the ordinary inconveniences, delays, and hazards incident to such trains, when equipped in the ordinary manner of equipping such trains and managed with proper care and skill. *Chicago & A. R. Co. v. Arnol*, 58 Am. & Eng. R. Cas. 411, 144 Ill. 261, 33 N. E. Rep. 204.

A person who takes passage on a freight train, knowing the risks and inconveniences incidental thereto, is bound to exercise more care with respect to his own safety and comfort than is required of him upon ordinary passenger trains. *Wallace v. Western N. C. R. Co.*, 34 Am. & Eng. R. Cas. 553, 98 N. Car. 494, 2 Am. St. Rep. 346, 4 S. E. Rep. 503.

One who takes passage on a freight train, although with a caboose attached, must take notice of the character of the train and use such ordinary care to avoid injury as the nature of the mode of travel will admit; one of the risks to be guarded against being that arising from the sudden jerk of the train on starting, due to the taking up of slack between the cars. *Louisville & N. R. Co. v. Bisch*, 41 Am. & Eng. R. Cas. 89, 120 Ind. 549, 22 N. E. Rep. 662.

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SMITH

v.

PHILADELPHIA, W. & B. R. Co.

(Court of Appeals of Maryland, Jan. 5, 1898.)

Ejection of Passenger—Exemplary Damages—Malice.*—While plaintiff, a passenger on defendant's train, was standing on the platform, after he had reached his destination, quarrelling with the brakeman, and delaying the train, he was jerked from the car by the conductor; with whom he had had no controversy. *Held*, that plaintiff was not entitled to punitive damages, there being no evidence that the act of the conductor was prompted by a malicious motive.

APPEAL by plaintiff from a verdict in his favor from Harford county circuit court. *Affirmed*.

Argued before MCSHERRY, C. J., and BRISCOE, BRYAN, PAGE, BOYD, FOWLER, and ROBERTS, JJ.

Albert Constable and James J. Archer, for appellant.

Thos. I. Donaldson and L. Marshall Haines, for appellee.

MCSHERRY, C. J. The only question discussed at the bar in this case was whether the trial court was right in giving to the jury an instruction that there was no legally sufficient evidence to warrant them in awarding punitive damages against the defendant. A verdict was rendered in favor of the plaintiff, and a judgment was entered thereon for \$500; but the plaintiff appealed because of the ruling just mentioned. The suit was brought to recover damages for a personal injury.

The plaintiff was a passenger on the cars of the defendant railroad company. He purchased a ticket entitling him to ride from Charlestown to Elkton. He

*See note at end of case.

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entered the ladies' car, and according to his own testimony, after taking a seat, placed his feet, which were muddy, against the side of the car, just under the window. While in that reclining posture, he was approached by "some one," whom he afterwards described as the brakeman, who "grabbed" him, and said, "Put your feet down, or I will make you do it." "This," the plaintiff went on to testify, "was very rough treatment, and I resented it very promptly." He further swore that he used pretty plain language to the person who had accosted him; and it is unquestionable that he thought the person whom he addressed was the brakeman. Whether conductor or brakeman, the official wanted to know—so the plaintiff said—where he (the plaintiff) intended to get off; and to that inquiry, which was a perfectly proper one, the plaintiff stated that he replied, "None of your business. I can take care of myself." When the train reached Elkton, the plaintiff's destination, the brakeman said, "Get out here. This is Elkton;" and the plaintiff replied, "I will get out when the car stops," to which he said the brakeman enjoined, "I will make you." The plaintiff then proceeded to testify thus: "He did not say this in a very mild manner, and, as I approached the door, he looked at me, showing malice on his countenance; and I turned to him, and I says, 'Don't put your hands on me,'—apprehensive that I might fall. * * * The next instant I was head foremost off the cars." It further appeared beyond dispute that the brakeman did not touch the plaintiff, but that he was pulled from the car platform by the conductor, who was standing down on the station platform. There can be no doubt in the world that the car had stopped before the plaintiff walked out of the car door to the car platform, because there were two ladies in front of him, who had alighted, and there were passengers entering from the station platform, while the plaintiff stood inside the car, and later, on the car platform. Instead of descending the steps, he continued on the platform of the car, making no more delay, he says, than he "would have done had a man been

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standing by" him "in a threatening attitude"; and he remained in that position because he felt apprehensive that the brakeman might push him off. There was evidence adduced to show that the plaintiff had been drinking, and that he was under the influence of liquor; and there was also evidence before the jury tending to show, if not actually showing, that the plaintiff did in fact delay the train by not alighting in a reasonable time after the train had come to a stop at Elkton. Indeed, any other inference from the entire evidence would have been pure conjecture. The plaintiff himself admitted, as just shown by a quotation from his own testimony, that he caused no more delay than he would have occasioned had a man been standing by in a threatening attitude. If he caused no more delay than, in his judgment, he would have produced had a man been standing by in the attitude he describes, then he must have caused some delay; and he was not justified in causing any. Nearly all the witnesses examined in behalf of the plaintiff testified to the verbal altercation between the plaintiff and the brakeman on the car platform, and to the further fact that the conductor reached up from the station platform, and pulled the plaintiff down from the car. The injuries sustained from that fall are those for which the pending suit was brought. According to the plaintiff's witnesses, there had been no dispute or contention between the plaintiff and the conductor, and the only remark imputed to the latter is "Yes, you will get down," as the conductor reached up, and, in the language of one of the witnesses, "jerked" the plaintiff down. There was much flat contradiction in the evidence, but it was the province of the jury to decide between the conflicting statements of the several witnesses; and we have nothing to do with that feature of the proof at all.

Conceding the truth of the plaintiff's case as made out by his witnesses, was there sufficient evidence before the jury to justify them in awarding punitive or exemplary damages? We are not concerned as to the right of the plaintiff to recover a verdict for something, nor

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as to his right to recover compensatory damages; and there is therefore no need to discuss the question of the degree of care with which the company was chargeable by the law. As the case stands, the jury, by their verdict, have settled the plaintiff's right to recover some damages; and there is, and there could have been in the conflicting condition of the proof, no exception in the record bringing up for discussion the question as to whether there was a total failure of evidence to sustain a recovery. Now, the force with which the act complained of was done is not the test by which the injury as to whether punitive damages are recoverable is to be determined. "On the contrary," say this court in *Railroad Co. v. Hoeflich*, 62 Md. 307, "to entitle one to such damages, there must be an element of fraud or malice or evil intent or oppression entering into and forming part of the wrongful act. * * * But where the act, although wrongful in itself, is committed in the honest assertion of a supposed right, or in the discharge of duty, or without any evil or bad intention, there is no ground on which such damages can be awarded." And in *Railroad Co. v. Larkin*, 47 Md. 162, quoting from *Quigley's Case*, 21 How. 213, it was said: "Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations." And the supreme court, in *Railroad Co. v. Arms*, 91 U. S. 493, said: "The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages." However this doctrine may be expressed, the adjudged cases now concur in holding that exemplary damages are awarded as a punishment for the evil motive or intention with which the unlawful act is done, and as a warning or example to others. "The

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mere fact," observed this court in Hoefflich's Case, *supra*, "that one is forcibly and deliberately ejected from a railroad car, does not necessarily imply that it was done wantonly or willfully, or with a bad motive, although the act may be in itself unlawful."

In the record before us there is a total failure of evidence to show that the act of the conductor in pulling or jerking the plaintiff from the car was, under all the circumstances proved by the plaintiff, done either wantonly or under the influence of a bad motive. . On the contrary, the inference is strong and obvious that no such motive could possibly have actuated the conductor. It was not shown by any one that there had been any altercation or dispute of any sort between the conductor, who actually and incontestably did the act complained of, and the plaintiff. There is no pretense that the conductor had occasion, because of any remark made by the plaintiff, to become incensed or angered or resentful towards the latter. The whole drift of the evidence adduced by the appellant tended to show that the contention, and the only contention, about the position of the muddy boots and the departure of the plaintiff from the car at Elkton, was between the brakeman and the plaintiff; and there is not the faintest spark of testimony indicating, or tending to indicate, that the brakeman touched the plaintiff after the latter reached the car platform, or that he in any way, directly or indirectly, caused or contributed to the injury which ultimately befell him. That there was a delay on the part of the plaintiff in leaving the car is clear beyond question; and that there was a disposition on his part to resent what he assumed or supposed to be the menacing appearance of the brakeman is wholly free from doubt on the plaintiff's own showing. By his own admission, instead of descending the car steps, he turned and warned the brakeman not to put his hands on him. This delay of the train and his tardiness in alighting are the only reasons that the evidence furnished for the conduct of the conductor. If that be so, there is no malice or wantonness shown, and no motive

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suggested for its existence; and it would therefore have been improper had the trial court permitted the jury to speculate and conjecture that there was a sufficient ground for awarding exemplary damages, when there was in reality no ground at all. There being no error in the ruling complained of, the judgment appealed against will be affirmed. Judgment affirmed, with costs in this court.

NOTE.

Ejection of Passenger—Exemplary Damages—Malice.—If a passenger applies for a ticket and is prevented from getting it either from the wilfulness or the mistake or inadvertence of the ticket agent, he is entitled to be carried at the ticket rate; and if, while insisting on such right, he be expelled in a spirit of oppressive malice or wantonness, he is entitled to exemplary damages; and a verdict awarding such damages will rarely be set aside for excess merely. In such case a passenger wrongfully expelled may be entitled to exemplary damages by reason of the time, place, circumstances, or manner of his expulsion, though no harsh or unnecessary means be resorted to to effect it. *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116.

Where a conductor wrongfully and maliciously ejects a passenger from his train, the jury may, in addition to compensation for injuries received, assess exemplary or punitive damages, and—*held*, that a slight circumstance, such as the retention of the officer in its employ by the company afterward, will be construed into a ratification of his act, and the company will be so liable. *Perkins v. Missouri, K. & T. R. Co.*, 55 Mo. 201.

To entitle a passenger to exemplary damages for his wrongful expulsion from a train, there must be evidence of undue force, unnecessary rudeness, or insult, malice, or some wilful wrong accompanying his ejection. *Tomlinson v. Wilmington & S. C. R. Co.*, 47 Am. & Eng. R. Cas. 620, 107 N. Car. 327, 12 S. E. Rep. 138.

Malice, wantonness, or oppression on the part of a conductor in putting a passenger off a train will not make the company liable for exemplary damages. *Pittsburgh C., C. & St. L. R. Co. v. Russ*, 57 Fed. Rep. 822.

In such case an error in instructing the jury that exemplary damages may be allowed is not cured by a subsequent statement that, in the opinion of the court, the conduct of the conductor was not wanton, malicious, or oppressive, as the mere opinion of the court is not binding on the jury. *Pittsburgh C., C. & St. L. R. Co. v. Russ*, 57 Fed. Rep. 822.

If the act of a conductor in maliciously ejecting a passenger from a car is wholly unauthorized, the company is liable for the actual damages resulting, and the conductor alone for the punitive damages, if any. *Turner v. North Beach & M. R. Co.*, 34 Cal. 594.

Alabama & V. Ry. Co. v. Holmes

ALABAMA & V. RY. CO.

v.

HOLMES.

HOLMES

v.

ILLINOIS CENT. R. CO.

(Supreme Court of Mississippi, Feb. 21, 1898.)

Ejection of Passenger—Mistake of Ticket Agent.*—Plaintiff, wishing to go to M., purchased a ticket from a connecting railroad company, between which and the defendant company there was an agreement to honor the tickets of each other; but through the mistake of the ticket agent of the connecting company a ticket to V. was issued to her, but her baggage was checked to M. She was ejected from defendant's car, though she duly presented such ticket and check, and though by the rules of both companies baggage could only be checked to a certain destination upon the presentation of a ticket to such place; and though she told defendant's conductor that she could not read, was without money, and in bad health. *Held*, that defendant was liable for the consequences of such ejection.

Same—Connecting Carriers.*—But the company from whom she purchased the ticket was not liable for such ejection.

APPEAL by defendant and cross appeal by plaintiff from Hinds county circuit court. *Affirmed*.

McWillie & Thompson, for Alabama & V. Ry. Co.
Brame & Alexander and *Miller & Baskin*, for
Lucretia Holmes.

Mayes & Harris, for Illinois Cent. R. Co.

TERRAL J. Lucretia Holmes sued the Alabama & Vicksburg Railway Company and the Illinois Central Railroad Company, seeking to recover of said companies damages for wrongfully ejecting her from the train of the former company. Being at Summit, on the line of the Illinois Central Railroad

Case Stated.

*See notes at end of case.

Company, and desiring to go to Meridian, on the line of the Alabama & Vicksburg Railway Company, she applied for a ticket to Meridian. The agent at Summit received the regular fare of a ticket to Meridian, and intended to issue to her a ticket to Meridian, but, by mistake, issued and delivered to her a ticket to Vicksburg. By an arrangement between said companies of long standing, the agents of each company had issued coupon tickets over the initial and connecting lines, which had been uniformly honored by the connecting line, and the conductor of the Alabama & Vicksburg Railway Company would have honored in this instance the ticket of Lucretia Holmes if it had been issued for Meridian. The plaintiff is an unlettered woman, and, not suspecting any mistake, she did not discover the mistake until her ticket was presented to the conductor of the Alabama & Vicksburg Railway Company for passage to Meridian. The plaintiff at Summit had her trunk checked to Meridian, and she received a check therefor, which showed that her trunk was to be carried to Meridian, and it appeared that her trunk was duly entered upon the waybill of the company for Meridian. It was in evidence that when compelled to leave the train she had in her possession her trunk check; that her trunk was in the baggage car marked for Meridian; that the waybill of it, in the hands of the baggage master, showed its destination to be Meridian; and it was also in proof that the companies only checked baggage upon presentation of a ticket by the passenger. Shortly after boarding the train of the Alabama & Vicksburg Railway Company at Jackson (the connecting point) for Meridian, the conductor required her ticket for her passage, and upon looking at it informed her that it was for Vicksburg, and that she could not proceed to Meridian. The ticket on its face showed where and by whom it was issued, and she explained to him how the mistake happened, as she supposed, through the mistake of Capt. Gracey, the agent at Summit; told him she could not read, had no money, and was sick; and asked him to look at her check,

Notes

ready to be produced ; and told him her trunk was on the train, she reckoned. The conductor, without looking at her trunk check or any examination of the waybill of it, ejected her from the train, as she says, in Pearl river swamp, and in consequence, and by reason of her ill health and subsequent sickness therefrom, she as she alleged, suffered the damages (\$500) awarded her, and introduced evidence tending to support her contention. By the rulings of the circuit court, the Illinois Central Railroad Company was discharged from liability, and the plaintiff recovered a verdict against the Alabama & Vicksburg Railway Company. We are of the opinion that the rulings of the circuit court are correct. They are supported by *Railroad Co. v. Riley*, 68 Miss. 765, 9 South. 443. It was shown that no baggage is checked unless upon a ticket presented, and the check and waybill, if examined, would have shown to the conductor that there was a mistake, and these facts very strongly supported plaintiff's explanation of the matter, and they cast upon the company the responsibility of taking the consequences of a wrong action. The judgment of the circuit court is affirmed.

NOTES.

Ejection of Passenger—Mistakes of Ticket Agents and Conductors.—Where it appeared that a plaintiff applied for a proper ticket, she was entitled to rely upon the one delivered to her by the agent without examining it, unless there were some intervening circumstances which required her to do so. *Georgia R. & B. Co. v. Dougherty*, 86 Ga. 744, 12 S. E. Rep. 747.

A passenger paid the price of a round-trip excursion ticket, but by an error in stamping the agent issued it so that the return portion was not good, and the passenger, being without means of paying his fare, was ejected at a way station, where he suffered much inconvenience and humiliation, after having explained the matter to the conductor. *Held*, that he was not restricted in the recovery of damages to an action for breach of the contract, but might sue for tort. *Poulin v. Canadian Pac. R. Co.*, 47 Fed. Rep. 858.

A carrier has no right to eject one from a train for failure to produce a proper ticket, it appearing that he had called for a ticket and received from the agent a ticket purporting to be such a one as he called for and for which he paid the requisite amount of fare. *Georgia R. Co. v. Olds*, 77 Ga. 673.

Notes

It is no defense to an action for wrongful expulsion that the conductor was honestly mistaken in believing that the passenger had not paid his fare. *Gorman v. Southern Pac. R. Co.* 97 Cal. 1.

Invalid Ticket or Token—Negligence of Carrier's Agent.—There is a radical conflict of authority as to the liability of the carrier for the ejection of a passenger who holds and tenders an invalid ticket or token the invalidity of which is due to the negligence of one of the carrier's agents. Some of the courts have held that the face of the ticket being, as between the conductor and the passenger, conclusive of the rights of the latter, there can be no recovery for the ejection of a passenger, but it is his duty to leave the train, and that his action against the carrier is limited to the recovery of actual damages for breach of contract to provide him with a proper ticket. This rule had its origin in the idea that the cause of the passenger's ejection having been occasioned by the simple negligence of the carrier in the first instance in having furnished him with a ticket or token which, under the rules of the carrier, unknown to him, did not permit him to ride on the train which he desired to take, and not by the action of the conductor who ejected him, he could recover only for his loss of time and actual expenses, and not for the ejection.

The decided weight of authority, however, now is to the effect that where the passenger exercised ordinary prudence in the purchase of his ticket, or in accepting a token showing that his fare had been paid to another conductor on the carrier's line, the latter cannot excuse itself from the consequences of its own act by showing that they were produced by the concurrent acts of two agents rather than by the sole act of the ejecting conductor. If the latter should fail to heed the explanations and protests of the passenger at that time, he does so at the financial peril of his employer.

United States.—*Northern Pac. R. Co. v. Pauson*, 44 U. S. App. 178, 70 Fed. Rep. 585; *New York, etc., R. Co. v. Winter*, 143 U. S. 60.

California.—*Sloane v. Southern California R. Co.*, 111 Cal. 668.

Indiana.—*Lake Erie, etc., R. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464.

Iowa.—*Ellsworth v. Chicago, etc., R. Co.*, (Iowa 1895) 63 N. W. Rep. 584.

Kentucky.—*Louisville, etc., R. Co. v. Gaines*, (Ky. 1896) 36 S. W. Rep. 174.

Maryland.—*Philadelphia, etc., R. Co. v. Rice*, 64 Md. 63.

Massachusetts.—*Murdock v. Boston, etc., R. Co.*, 137 Mass. 293, 50 Am. Rep. 307.

Michigan.—*Hufford v. Grand Rapids, etc., R. Co.*, 64 Mich. 631, 8 Am. St. Rep. 859; *Rouser v. North Park St. R. Co.*, 97 Mich. 565.

New York.—*Tarbell v. Northern Cent. R. Co.*, 24 Hun (N. Y.) 51; *Muckle v. Rochester R. Co.*, 79 Hun (N. Y.) 33, *limiting* *Townsend v. New York Cent., etc., R. Co.*, 56 N. Y. 295, 15 Am. Rep. 419.

Pennsylvania.—*Baltimore, etc., R. Co. v. Bambrey*, (Pa. 1888) 16 Atl. Rep. 67; *Laird v. Pittsburgh Traction Co.*, 166 Pa. St. 4.

Texas.—*Gulf, etc., R. Co. v. Halbrook*, (Tex. Civ. App. 1896) 33 S. W. Rep. 1028.

West Virginia.—*Trice v. Chesapeake, etc., R. Co.*, 40 W. Va. 271.

Where the plaintiff purchased a ticket from the defendant's agent, which the agent had a right to sell and receive pay for, covering the distance between two stations, and was informed by the agent

Notes

that it was good and entitled him to ride between the said two stations, it was held that the plaintiff had a right to rely upon the agent's statements, and that the ticket so delivered by him was evidence agreed upon by the parties by which the defendant should thereafter recognize the rights of the plaintiff in the contract thus made with the agent, and was conclusive upon the subject. *Hufford v. Grand Rapids, etc., R. Co.*, 64 Mich. 631, 8 Am. St. Rep. 859, *overruling Hufford v. Grand Rapids, etc., R. Co.*, 53 Mich. 121, and *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 342, 26 Am. Rep. 531.

Same—Connecting Carriers.—Where two connecting companies use a station jointly, or hire one person to discharge the duties of ticket agent for both, and such person sells a ticket over one of the roads, the other company is not responsible for the negligence of the connecting road. *Atchison, T. & S. F. R. Co. v. Cochran*, 41 Am. & Eng. R. Cas. 48, 43 Kan. 225, 7 L. R. A. 414, 23 Pac. Rep. 151.

By an agreement between the defendant and another company the defendant was to appoint an agent whose duty it was to receive and collect freight, to sell all passengers tickets, and to receive the revenues accruing from the joint operations of the two companies. *Held*, that by this agreement there was no partition of the agency as to the sales of through tickets over both roads, and that the defendant was responsible for the manner in which this agent discharged his duty in the sale of such tickets. *Northern C. R. Co. v. Scholl*, 16 Md. 331.

Where three companies constitute a through line, and the fare received for through tickets is accounted for by the first company to the other companies, according to a tariff established by each company for itself, and there is no division of profits or losses, such an arrangement is not a partnership involving joint liability. *Croft v. Baltimore & O. R. Co.*, 1 MacArth. (D. C.) 492.

The sale of a through ticket over the route formed by the connecting lines of several companies and the checking of baggage to the end of the route, without other evidence of the relations between the companies or the basis upon which through business was done by them, fails to show such a community of interest as would make them partners *inter sese*, or as to third persons; nor will such action make the last carrier liable for the negligence of the contracting carrier, or of any other carrier in the combination. *Atchison, T. & S. F. R. Co. v. Roach*, 27 Am. & Eng. R. Cas. 257, 35 Kan. 740, 12 Pac. Rep. 93.

Several companies entered into an arrangement for the sale of through coupon tickets over the several roads, or for intermediate places. Plaintiff bought a ticket at one end of the through route from an agent who was appointed by each company separately, under an arrangement between the companies providing, among other things, for a division of the ticket money among the respective companies, in proper proportion, once a month. *Held*, that such arrangement did not constitute the several companies partners, so as to make the initial carrier liable for a loss of baggage occurring on the line of the second carrier. *Straiton v. New York & N. H. R. Co.*, 2 E. D. Smith (N. Y.) 184.

Where a company's trains, by an arrangement with another company, regularly enter and depart from the depot of the latter, and it intrusts to the latter the business of handling and checking the baggage of its passengers, and furnishes its own checks there-

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for, the latter company must be deemed the agent of the first-named company in respect to such business. *Ahlbeck v. St. Paul, M. & M. R. Co.*, 39 Minn. 424, 40 N. W. Rep. 364. *Nashville & C. R. Co. v. Sprayberry*, 8 Baxt. (Tenn.) 341, 9 Heisk. (Tenn.) 852, 20 Am. Ry. Rep. 55. *Washington v. Raleigh & G. R. Co.*, 37 Am. & Eng. R. Cas. 25, 101 N. Car. 239, 1 L. R. A. 830, 7 S. E. Rep. 789.

WINSHIP

v.

NEW YORK, N. H. & H. R. R.

(*Supreme Judicial Court of Massachusetts, March 3, 1898.*)

Carriers of Passengers—Injury to Passenger on Platform—Parcel Thrown from Express Car—Liability of Railroad Company.*—Under the law of Massachusetts a railroad company is not liable for negligence on the part of expressmen not in its employ; and in an action for injuries to plaintiff caused by a parcel being thrown from defendant's train, from a car of which she had just alighted, it appeared from plaintiff's evidence that it was thrown from an express car. *Held*, that it was not error to refuse to submit the case to the jury.

Nonsuit—Negligence of Counsel.—And if plaintiff's counsel wished to contend that plaintiff was mistaken, and to argue before the jury that the parcel was thrown from a different car and not by an expressman, he should have given the court notice of such intentions.

CASE reserved from Suffolk county superior court.
Judgment for defendant.

John W. Corcoran and Willlam B. Sullivan, for plaintiff.

Benton & Choate, for defendant.

HOLMES, J. This is an action for personal injuries received by the plaintiff while a passenger on the defendant's train. She had been directed by the conductor to take the rear car, in order to be carried to Randolph, her destination. When the train stopped at Quincy, she had got out, and was going towards the rear of the train, when she was

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*As to injury caused by things thrown from car, see generally, 6 Am. & Eng. R. Cas., N. S., *note*.

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struck by a bundle which was thrown from one of the cars.

The judge ruled that the defendant was not liable, undoubtedly on the assumption that it was not contro-

Carriers of Pas-
sengers—Injury to
Passenger on Plat-
form—Parcel
thrown from Ex-
press Car—Liabil-
ity of Railroad
Company.

verted that the bundle was thrown from an express and baggage car which was on the train. On that assumption the ruling was correct. If the plaintiff's case had stopped with the fact that the bundle which struck her came from the defendant's train, she would have been entitled to go to the jury, because the jury would have been warranted in saying, from their general experience, that parcels commonly are not thrown from trains by passengers, and, when thrown, are thrown most commonly by railroad hands. If this had been the opinion of the jury, they would have been warranted in presuming that what they thought usual had happened in this case. The plaintiff had a right, of course, to stop with the case supposed, and to controvert any additional evidence that might be offered to qualify or control it. But, if the plaintiff did not choose to stop with the fact that the bundle was thrown from the train, but saw fit to go further, and show it to have been thrown from an express car, by her own act she destroyed her right to go to the jury, because a jury certainly could not say that bundles thrown from an express car, or from an express and baggage car, generally are thrown by train hands, rather than by expressmen, and therefore could not make the necessary presumption of fact against the defendant and in favor of the plaintiff. If the bundle was thrown by an expressman, not a servant or agent of the company, the defendant was not liable. St. 1894, c. 469, § 3.

Upon the testimony the judge was warranted in understanding and assuming the plaintiff's own case to be that the bundle came from the express

Non suit—Negli-
gence of Counsel.

and baggage car, and in ruling upon that assumption. Not merely was all the testimony in the case to that effect, so that if the jury had

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accepted so much as imported that the bundle came from the train, and had rejected the specification attached that it came from an express car, such a selection and rejection would have been simply arbitrary, and unjustified by argument or reason, but the plaintiff herself testified that she noticed the express car, and saw a man and a long bundle, with one end raised as though the person was in the act of unloading a package, and that immediately afterwards she was hit. Under such circumstances, the judge reasonably might assume that the facts were as the plaintiff testified. If her counsel had wished to contend that she was mistaken, and, in the face of all the evidence, to argue to the jury that the parcel came from a different car, or was not thrown by an expressman, he ought to have given the judge some notice of his wish, and to have made it appear that he did so, before complaining that the judge assumed that what the plaintiff said was true.

Judgment on the verdict.

HARRIMAN

v.

PULLMAN PALACE-CAR CO.

(*Circuit Court of Appeals, Eighth Circuit, Feb. 7, 1898.*)

Injury to Passenger on Sleeping Car—Negligence of Porter—Evidence to Show Usual Conduct of Employees.*—In an action against a sleeping-car company for injuries sustained by a passenger on a sleeping-car through the alleged negligence of its porter, it was error to admit evidence to show that such porter was usually careful and competent.

Same.—And the fact that a witness for plaintiff testified in the course of the trial that she had upon one occasion noticed such porter doing his work in a manner tending to show that his work put him in an unpleasant frame of mind, did not render admissible evidence to show that he was usually careful and competent.

*See note at end of case.

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IN ERROR by plaintiff to the Circuit Court of the United States for the Western District of Missouri. *Reversed and remanded.*

John W. Beebe, for plaintiff in error.

Samuel W. Moore (*Gardiner Lathrop*, *Thomas R. Morrow*, and *John M. Fox*, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges.

THAYER, Circuit Judge. This action was brought by Maggie M. Harriman, the plaintiff in error, against the Pullman Palace-Car Company, the defendant in error, to recover damages which she claimed to have sustained while a passenger on one of the defendant's sleeping cars, by reason of the carelessness of the porter who had charge of the car. Her complaint was, in substance, and some evidence was offered which tended to show, that, while she was sitting in the berth or seat to which she had been assigned in the car, she was struck a severe blow on the back of her head by a movable partition between the berths, which was at the time being handled by the porter in the discharge of his customary duties, and that the blow was solely attributable to the careless manner in which it was handled.

The sole question for consideration on the present record is whether prejudicial error was committed by the trial court in permitting the defendant company to introduce testimony tending to show that the porter, through whose fault the injury complained of was alleged to have been sustained, was usually careful, competent, courteous, and attentive. Such testimony was admitted during the progress of the trial over the plaintiff's objection, and to its admission counsel for the plaintiff duly excepted. The rule is well established by many authorities that an employer, when sued by one who has sustained an injury in consequence of a particular negligent act on

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the part of his servant, is not at liberty to disprove the charge by evidence tending to show that the servant was a person of general good repute, who, in the discharge of his duties, had always theretofore displayed the requisite skill and caution, because such evidence is not relevant to the issue, and is only admissible in those cases where the master is accused of having knowingly employed an incompetent servant. Persons sometimes fail to exercise ordinary care, although as a rule they are careful, and for this reason proof that one is generally prudent and cautious has no necessary tendency to show that on a particular occasion he was not negligent. Besides, the practice of establishing the quality of one's act in a given instance by his conduct at other times, or by his general line of conduct, would have an inevitable tendency to create collateral issues. When, therefore, a complaint does not charge incompetency, but simply alleges that an employee acted carelessly on a given occasion, the proof should be confined to his acts on that occasion, and should not embrace an inquiry concerning his conduct on other occasions, or his general conduct, which is a subject in no wise involved in the issue. *Thompson v. Bowie*, 4 Wall. 463; *McDonald v. Inhabitants*, 110 Mass. 49; *Towle v. Improvement Co.*, 98 Cal. 342, 33 Pac. 207; *Adams v. Railway Co. (Iowa)* 61 N. W. 1059; *Connors v. Morton*, 160 Mass. 333, 335, 35 N. E. 860; 2 *Thomp. Neg.* p. 804; *Deer. Neg.* § 5407; *Jones, Ev.* § 162.

Counsel for the defendant do not appear to question the rule of evidence last stated; nor its applicability to the case in hand. They seek to justify the admission of the evidence, however, on the ground that the plaintiff herself had challenged the general habits of the porter for caution and urbanity, and, by so doing, had made that one of the relevant issues in the case. We do not find, however, that this contention is supported by the evidence. The claim is based entirely on the ground that, in the course of the trial, one witness for the plaintiff testified, in substance, that, shortly prior to the injuries complained of, she

Same.

Note

noticed the porter doing his work, and that he did not seem to be in a pleasant frame of mind, but worked quick, and "jerked himself about like a boy who did not want to do his chores." It is no doubt true that the defendant company was entitled to rebut this statement of the witness by showing that the porter was not in the frame of mind, and did not act on the occasion in question in the manner, described by the witness; but the evidence was not of such character as to make testimony touching the general conduct of the porter either relevant or competent. We are satisfied that the evidence complained of was improperly admitted, the same not being relevant to the issue involved in the case; and, as it may have been prejudicial to the plaintiff, the judgment will be reversed, and the cause remanded for a new trial.

NOTE.

Negligence—Evidence to Show Usual Conduct of Employees.—Where a person is injured while driving on the street, by colliding with a street car, and the negligence of his driver is sought to be imputed to the plaintiff, the question is whether the driver was negligent on that occasion; therefore evidence tending to show that the driver had been in plaintiff's employ for a number of years, and had always been careful, is irrelevant. *Wooster v. Broadway & S. A. R. Co.*, 55 N. Y. S. R. 174, 72 Hun 197, 25 N. Y. Supp. 378.

Barth v. Kansas City El. Ry. Co

BARTH

v.

KANSAS CITY EL. RY. CO.

(*Supreme Court of Missouri, Feb. 1, 1898.*)

Elevated Railways--Death by Wrongful Act--Pleading.—In an action against an elevated railway company for the death of plaintiff's husband, alleged to have been caused by defendant's negligence in starting its car while plaintiff was in the act of getting on such car and its negligence in constructing the railing of its platform so as to leave a gap between the end of such railing and defendant's track, an amended petition filed more than six months after the cause of action accrued is not defective in that it fails to aver that deceased left no minor children, where it appears from the records of the court that the original petition was filed within six months after the right of action accrued.

Negligence—Evidence—Demurrer.—Where plaintiff's evidence, if taken as true, makes out a case of actionable negligence, plaintiff is entitled to have such evidence submitted to the jury; and a demurrer to evidence admits every fact which the jury might infer from the evidence if it was before them.

Open Gates—Invitation to the Public.*—The facts that a car has stopped at a station and the gates for the ingress of passengers are open constitute an invitation to would-be passengers to get on such car.

Care Owed to Person Boarding Car.—And a railway company owes the highest degree of care to a person attempting to board its car after it had invited him to do so by stopping the car and opening its gates of ingress.

Same.*—It is the duty of railway companies to stop their cars sufficiently long at stations to allow such persons to get on by the use of reasonable expedition and care.

Defective Platform—Pleading and Evidence—Question for Jury.—The allegations of plaintiff's amended petition, and the evidence, which showed that there was a gap 26 inches in width between the end of the platform railing and the side of the car as it passed and that deceased after falling from the car steps fell from the platform through such gap, warranted the submission to the jury of the question whether or not such railing was negligently constructed.

Measure of Damages.—It was not error in such action to instruct the jury that, if they found for plaintiff, they would award her "such damages, not exceeding \$5,000, as you may deem fair and just under the evidence in this case, with reference to the necessary injury resulting to her from the death of her husband."

*See note at end of case.

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Same.—Although plaintiff in such action was not entitled to any damages for the pain and anguish she suffered because of the tragic death of her husband, a requested instruction restricting her compensation to the mere present money loss she had suffered was properly refused.

APPEAL by defendant from Jackson county circuit court. *Affirmed.*

Pratt, Ferry & Hagerman, for appellant.

Meservey, Pierce & German, for respondent.

GANTT, P. J. This action is by the widow of Bartholomew Barth for damages resulting to her from his death, occasioned, as she alleges, by the negligence of the defendant, at its elevated station at Ninth and Mulberry streets, in Kansas City, Mo. Plaintiff's husband was killed February 25, 1894, and this action was commenced March 22, 1894. The record shows that at the April term, 1894, defendant appeared and moved to dismiss the suit, which motion was overruled. On May 5, 1894, defendant demurred, but on June 16, 1894, withdrew its demurrer, and on the same day plaintiff filed an amended petition, which defendant answered October 9, 1894, and afterwards, on December 12, 1894, the second amended petition, on which this cause was heard was filed. It contained two counts, but, as the second count was withdrawn, the first count only remains as the basis of the judgment recovered. The first count avers, in substance, that plaintiff, on the 25th of February, 1894, was the lawful wife of Bartholomew Barth, and on that day defendant was a railway corporation organized under the laws of Kansas, and was engaged in operating an elevated electric street railway for the carriage of passengers for hire between Kansas City, Kan., and Kansas City, Mo.; that, in order to patronize said railway, passengers were required to ascend to its stations by means of steps, and go upon elevated platforms, in order to get into its cars; that the platform and station at Ninth and Mulberry streets is about 20 to 30 feet above the surface of the ground; that on the west end of said platform defendant had erected a

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fence or guard railing to protect persons patronizing its road from falling off of said platform, but had so negligently or carelessly constructed it that it left a space of about three feet between the track of said company and the south end of said fence or railing, thus rendering said platform exceedingly dangerous to its patrons making use thereof to enter its trains ; that it had permitted said platform to remain in this condition for a year prior to February 25, 1894, and for a time sufficient for defendant to have ascertained its dangerous condition, by the exercise of ordinary care. The petition then charges the facts attending the death of plaintiff's husband in these words: "Plaintiff further states, for the purpose of admitting passengers to the cars owned and operated on its said railroad as aforesaid, steps are supplied on the right-hand side of the rear platform, by the aid of which passengers are invited and are accustomed to go up upon the platform and into said cars ; that each of said cars, and the particular one hereinafter mentioned, is provided with a gate, which is intended to guard against accidents, and to prevent passengers from falling from the cars while in motion ; that the rules of the defendant company provided that the gates of the cars should be kept closed while the cars were running over the elevated structure, and that the cars would not be started until passengers were fairly landed or received on the car ; that it was the duty of the agents, employees, and servants of defendant to keep said gates closed while running said cars over the elevated structure, and they were only accustomed to be open while the cars were stopped for the admission of passengers at the several stations along said railroad." "Plaintiff states that, to wit, on said 25th day of February, 1894, the husband of plaintiff, Bartholomew Barth, entered the station of said defendant company at the corner of Ninth and Mulberry streets, as aforesaid, for the purpose of taking a trip west as a passenger on one of defendant's cars. Plaintiff states that the destination of her said husband, Bartholomew Barth, was his home in Kansas City,

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Kansas, near one of the terminal stations of said defendant company, in said Kansas City, Kansas, and that upon the arrival at said station of the first car of said railway, conducted, maintained, and operated by said defendant, and so propelled by the servants, agents, and employees of defendant's company, and after said car had been stopped and the gate of the car opened for the admission of passengers, the husband of said plaintiff attempted to get upon said car for the purpose of riding upon the same as aforesaid. Plaintiff states that while Bartholomew Barth was in the act of getting upon said car, and before he had sufficient time to get upon the platform of said car, and without waiting for said Bartholomew Barth to board said car, or to get upon a safe portion of the platform of the same, and before said gate had been closed, the agents, servants, and employees of defendant, managing its said railway and in charge of said car, and knowing that he was in the act of boarding said car, negligently and carelessly started said car forward suddenly, and at a rapid rate of speed, causing said Bartholomew Barth, the husband of this plaintiff, to be thrown with great force and violence off of the car and upon the platform, near the point where said fence or guard on the west end of said platform was negligently and carelessly left open; and by reason of the fact that said fence or guard was left exposed and open on the west end of said platform as aforesaid, and there being nothing to stop his body and nothing which he could grasp to save himself, he was by the impetus of said fall from defendant's car, propelled with great force and violence over said platform, to the surface of the ground, twenty (20) to thirty (30) feet below. Plaintiff states that by reason of said fall, caused by the negligence and carelessness of the servants, employees, and agents of said defendant, as aforesaid, said Bartholomew Barth, the husband of plaintiff, was so greatly bruised, mangled, and hurt; that he died; that such death resulted from, and was directly occasioned by, the defect and insufficiency in the construction of said guard

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or fence as aforesaid, and by the carelessness and negligence of said servants, agents, and employees in so starting said car, before said Bartholomew Barth had got upon said car, and before the gate to said car was closed as aforesaid. Plaintiff states that she was dependent upon the deceased, Bartholomew Barth, for her support, and has suffered pecuniary loss, and has been otherwise injured by the death of said Bartholomew Barth, to her damage in the sum of five thousand (5000.00) dollars. Wherefore plaintiff asks judgment for said sum of five thousand (5000.00) dollars, and for all costs herein incurred and expended."

The answer is a general denial and plea of contributory negligence of plaintiff's husband. At the January term, 1895, there was a verdict and judgment for plaintiff for \$4500. Motions for new trial and in arrest were duly filed and overruled, and defendant appeals.

The evidence disclosed these facts: The station at Mulberry street, on defendant's line, is at least 20 feet above the surface of Ninth and Mulberry streets, and is reached by a stairway. The platform was about 38 feet long, and the station house in the center, with two doors opening south on the platform along the tracks. It is 19 feet from a point between the two doors to the western edge of the platform. The platform is about 8 feet wide in front of the station house. The mode of operation is to require passengers to remain in the station house until a car arrives, and then open the door, and the passengers cross the platform and enter the cars. The cars are supplied with iron gates for the platforms to protect passengers from falling. Electricity is the motive power. At the west end of the station platform the company had erected and maintained an iron fence or railing. When a car stood opposite the end of this railing, it was 26 inches from the end of the railing, leaving a space of that length open. With these physical facts in view, the petition was predicated upon two acts of negligence: First, the starting of the car suddenly forward while plaintiff's husband was attempting to get upon the platform to go to his home;

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second, the maintaining of an insufficient railing or guard on the west end of the station platform. On the afternoon of February 25, 1894, about 5 o'clock, plaintiff's husband, Bartholomew Barth, a man about seventy-one years old, ascended the steps to defendant's said station at Mulberry and Ninth streets, to take a car for his home in Kansas City, Kan. A car soon arrived from the Union Station, in Kansas City, Mo., en route for Kansas City, Kan. It was designated as a Chelsea Park car. Immediately behind, and following it, was another car of defendant's known as an Edgerton Place car. The evidence shows quite satisfactorily that the Edgerton car would have taken Mr. Barth to a point nearer his residence, but that he often went on the Chelsea Park cars. The testimony is somewhat conflicting as to the minor details of the occurrences immediately attending Mr. Barth's death, but the substantial facts are these: Upon the arrival of the Chelsea Park car at the station platform, a passenger alighted therefrom, and immediately a man by the name of Veal preceded Barth up the car steps and upon the rear platform of the car. Mr. Barth, following, stepped upon the first step of the car, while it was yet standing still, and was in the act of stepping up, either upon the second step or the platform, accordingly as remembered by different witnesses, when the conductor signaled the motorman to start the car, and the sudden starting or jerking of the car either caused Barth to lose his balance and fall off, or to step off, to keep from falling, and when he struck the platform he toppled over the western edge of the platform, through the open space between the end of the railing and the car, and fell to the street below, and received injuries from which he died that evening. Some of the witnesses testified he fell off, others that he stepped off, but the great preponderance supported the finding of the jury that he fell off. Again, there was evidence that the deceased said to the conductor that he would take the next or Edgerton Place car, but these witnesses testified that they saw no effort upon his part to voluntarily

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leave the car. On the other hand, other witnesses testified that at the same time that the conductor signaled the motorman to start the car he told Barth he had better get off, and take the next car, and these witnesses say that the deceased did not then have time to leave the car before it began to move. Much testimony was elicited as to the exact point along the platform at which the car stopped, how far it had moved before deceased attempted to leave it or fell off, and how far it had gone and how fast it was moving when he fell. The seeming contradictions are such and only as naturally occur in the evidence of the most trustworthy witnesses. From the whole, one fact was overwhelmingly established, to wit, that, whether Barth fell or stepped off, he had so acquired the momentum of the moving car that, immediately upon striking the platform, he toppled over its western edge, and fell to the ground below. The evidence would seem to be largely in favor of the testimony which placed the car west of the door when it stopped, and that it had started again before Barth fell off or left it, and had reached so near the western edge that, upon falling, he was at once precipitated to the street below.

Upon this state of facts the trial court instructed the jury in its first and third instructions for the plaintiff as follows: "First. The jury are instructed that it was the duty of those in charge of the car operated by the defendant company to stop at the station a reasonably sufficient length of time to allow passengers to get off and on the cars in safety; and if the jury believe from the evidence that they did not do so, and that while they saw plaintiff's husband getting upon the car they negligently, carelessly, and suddenly started up the car while he was in the act of getting on the car, and that plaintiff's husband was thereby thrown from said car and killed, without any fault or negligence on his part, then your verdict should be for the plaintiff." "Third. If you find from the evidence that the servants of the defendant stopped the car at the Mulberry street station for the purpose of receiving and letting off pas-

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sengers, but did not stop the same a reasonably sufficient length of time to enable the plaintiff's husband, by the use of reasonable expedition and care, to get safely upon the car before it again started, and it was so started by the agents and servants of the defendant, while they saw that plaintiff's husband was in the act of climbing the steps of the platform for the purpose of getting upon the car as a passenger, whereby he was thrown down and killed without any fault or negligence on his part, then your verdict must be for the plaintiff." For the defendant the court instructed the jury: "No. 6. If the injury to Barth was caused by an attempt to step off or on a moving car on the elevated road, then plaintiff cannot recover. No. 7. Barth was required to use his eyes and senses; and if by the use of same, and exercise of reasonable care, he could have gotten up into the car or off on the platform in safety, and thereby have avoided the injury, then plaintiff cannot recover. No. 8. If Barth was injured while attempting to step off the car on the elevated road while the car was in motion, then plaintiff cannot recover herein. No. 9. If Barth was injured by reason of attempting to get on a moving car on the elevated road, then plaintiff cannot recover herein." Other instructions will be discussed in the opinion.

1. Considering the grounds assigned for reversing the judgment of the circuit court in the order of defendant's brief, the sufficiency of plaintiff's petition is first. The amended petition of Elevated Railways—Death by Wrongful Act—Pleading. the widow avers that her husband's death was caused by the negligence of defendant, and occurred on February 25, 1894. Her amended petition was filed December 12, 1894, or more than six months after his death, without averring there were no minor children. Section 4425, Rev. St. 1889, gives an action to the wife of the deceased, when her husband's death is caused by the negligence of the defendant, in the cases therein mentioned, provided she brings suit within six months after such death. If she fails to sue within six months, then the right of action is in the

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minor children of the deceased, if such there are. If there are no such minor children, she may bring her suit in twelve months. Counsel for defendant insist that the petition is fatally defective in not averring there were no minor children, relying upon *Barker v. Railroad Co.*, 91 Mo. 86, 14 S. W. 280. But it does appear by the record in the cause that the action was commenced within six months, and that it has been continuously pending upon the original or amended petitions since the 22d day of March, 1894. Our Code of Civil Procedure expressly dispenses with the necessity of pleading any matter or fact of which the courts will take *ex officio* notice. Section 2076, Rev. St. 1889. It is fundamental that courts will take notice of their own records in the same cause; hence there was no necessity for averring the filing the original petition within six months after Mr. Barth's death. *State v. Ulrich*, 110 Mo. 350, 19 S. W. 656; *State v. Jackson*, 106 Mo. 174, 17 S. W. 301; *Bliss*, Code Pl. §§ 177, 199.

2. It is next insisted that the circuit court erred in not sustaining the demurrer to the evidence. Without repeating the testimony, the substance of which is set out in the statement, it suffices ^{Negligence—Evidence—Demurrer.} to say that there was much evidence tending to establish that when defendant's car reached Mulberry street and Ninth it stopped to permit passengers to alight and others to enter; that Mr. Barth, the deceased, stepped upon the steps of the car to take passage; that while in the act of stepping upon the platform the conductor rang the bell, and the car was suddenly started forward, and that Mr. Barth either fell off, or stepped off to avoid falling off, upon the station platform, and, by reason of the acquired momentum, was precipitated to the surface of the street below and killed. Whatever the contention of defendant may be as to other testimony which it claims contradicts this evidence for plaintiff, plaintiff was entitled to go to the jury if this evidence, taken as true, made out a case of actionable negligence, because it is settled law in this state

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that a demurrer to evidence admits every fact which the jury might infer from the evidence if it were before them. *Rine v. Railroad Co.*, 100 Mo. 228, 12 S. W. 640; *Myers v. City of Kansas*, 108 Mo. 480, 18 S. W. 914; *Franke v. City of St. Louis*, 110 Mo. 516, 19 S. W. 938. Certainly, it cannot be said that, when the plaintiff closed in chief, any negligence on the part of her deceased husband had been shown. When the car

Open Gates—Invitation to the Public.
Ilc.

of defendant stopped at the Mulberry street station, and passengers were permitted to alight, and the iron gate to the platform was opened, it was an invitation to Mr. Barth to take passage thereon. There was no delay on his part in attempting to board the car. He followed immediately in the wake of others who went on the car at that station. The conductor had not given any reasonable signal that it would no longer be safe to attempt to get on the car. By permitting him to thus enter upon its

Care owed to Person Boarding Car.

steps or platform, the plaintiff at once became and was accepted as a passenger on said car, and defendant was bound to exercise the highest degree of care of a prudent person, under similar circumstances, for his safety, and be held to a strict responsibility therefor. *Brien v. Bennett*, 8 Car. & P. 724; *Smith v. Railway Co.*, 32 Minn. 1, 18 N. W. 827. Having, then, invited the deceased to place himself in a dangerous position, it is too clear for discussion that it was the duty of the conductor to wait the few moments necessary to enable the deceased to get safely on the car, and the conductor to close the gate behind him. To hold otherwise would be to encourage a reckless disregard of the lives and safety of the traveling public. Considering the character of the agencies employed by the defendant as a carrier of passengers, the evidence of the plaintiff's witnesses of invitation to take passage, and the giving of the signal while deceased was still in the act of stepping aboard the car, we have no hesitancy in holding the demurrer to evidence was properly refused. A common carrier of passengers is bound to allow its passengers reasonable

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time to enter and leave its cars, and, while it may start before a passenger has been seated, it must exercise the highest degree of care that prudent and cautious persons would use and exercise, under similar or the same circumstances, in starting its cars so as not to suddenly jerk or jar him, and thereby injure him. *Dougherty v. Railroad Co.*, 97 Mo. 647, 11 S. W. 251; *Smith v. Railroad Co.*, 108 Mo. 243, 18 S. W. 971; *Jackson v. Railroad Co.*, 118 Mo. 199, 24 S. W. 192; *Gilson v. Railroad Co.*, 76 Mo. 283; *Furnish v. Railroad Co.*, 102 Mo. 438, 13 S. W. 1044; *Jacquin v. Cable Co.*, 57 Mo. App. 320. The objection that the evidence of Veal, Cresswell, and Allnew did not support the first and only remaining count in the petition seems to have been made without a copy of that count before the learned counsel. This evidence strictly corresponded with the allegations of that count.

3. Instructions Nos. 1 and 3, given at the instance of plaintiff, correctly declare the law. If the jury found, which they evidently did, the facts upon which the recovery was predicated, plaintiff's husband was a passenger, and entitled to the strict care defined in the last paragraph of this opinion. *Schepers v. Railroad Co.*, 126 Mo. 665, 29 S. W. 712, and *Schaefer v. Railway Co.*, 128 Mo. 71, 30 S. W. 331, are not in point. In those cases the attempt was to board a moving car, whereas in this the evidence is absolutely conclusive that the train had stopped to receive passengers, and while it was standing still the deceased stepped upon the steps of the platform. As already said, he was entitled to all the protection of a passenger under these circumstances.

4. The second instruction for plaintiff is earnestly challenged on the ground that the pleadings do not warrant the submission of the negligent construction of the railing to the jury, and because there was no evidence tending to prove that it was negligently built. Said instruction is in these words: "(2) You are further instructed that it was the duty of the defendant railway

Same.

Defective Platform—
Pleading and Evi-
dence - Question
for Jury.

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company to exercise ordinary care and prudence in constructing and maintaining reasonably sufficient and proper railings and guards at the ends of its station platforms for the reasonable safety of persons using its platforms and cars, and, if you believe from the evidence that it failed to exercise such ordinary care and prudence in constructing and maintaining the railings or guards at its Mulberry street station, then it was guilty of negligence in that regard." Before proceeding to discuss this question, however, it must be constantly borne in mind that it does not authorize a recovery by itself. The effect of the negligent construction is only submitted to the jury along with the negligent starting or management of the car, as will be seen from the plaintiff's fourth instruction, in these words: "(4) If you find that the injuries resulting in the death of the plaintiff's husband, Bartholomew Barth, were caused by the negligence of the servants or employees of defendant in charge of the car, in suddenly starting the car while said Barth was in the act of stepping up upon the platform of said car, combined with the negligence of defendant in so constructing the railing at the west end of the platform as to leave the open space at the end of the platform described in evidence, if you find that such construction was negligent, then you will find for the plaintiff, and give her such damage, not exceeding five thousand dollars, as you may deem fair and just, under the evidence in this case, with reference to the necessary injury resulting to her from the death of her husband; and, in such case, your verdict should be in the following form: 'We, the jury, find the issues for the plaintiff, and assess her damages at the sum of——dollars. ———, Foreman.' " It is obvious that the petition declares upon two concurring acts of negligence on part of defendant: First, the sudden jerk in starting the car, whereby plaintiff's husband was precipitated from the car; and, second, negligence in leaving such a wide space between its railing and the cars so that when he fell, or was compelled to step from the car, there was nothing to prevent his falling

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from the station platform to the street below. These instructions, then, are not outside of the pleadings. Was there substantial evidence supporting them? Keeping in view that this was an elevated road, the most ordinary care would dictate that the edges of such a structure should be guarded with a railing or fence. This much seems to be conceded by defendant, but it maintains that there was no proof that leaving a space of 26 inches between the end of the railing and the sides of the cars as they passed was negligence. "Where a given state of facts is such that reasonable men may fairly differ upon the question whether there was negligence or not, the question is one for the jury," under our system of laws. *Murphy v. Railroad Co.*, 115 Mo. 111, 21 S. W. 862; *O'Mellia v. Railroad Co.*, 115 Mo. 205, 21 S. W. 503. Bearing in mind that this was a railroad for the carriage of passengers alone; that neither employees nor passengers were allowed to ride outside; that gates were constructed to the platform to keep passengers off of the steps,—no necessity apparently existed for extra space between the sides of the car and the end of the railing to prevent accidents, and none was shown. The dangerous character of the transportation forbade both employees and passengers hanging on the outside of the cars. There was no evidence that defendant invited or permitted its patrons to ride outside of the cars. Defendant relies upon *Evans v. Railway Co.*, 106 Mo. 594, 17, S. W. 489, as strongly in its favor. In that case, as in this, it was an elevated road. The space left was only 12 inches, and the fact that a post was after the accident placed in this space was urged as showing that leaving the space of 12 inches was negligence. But this court said: "There can be no doubt but a railing was necessary to guard against accidents. We do not understand counsel for plaintiff to question this proposition. Indeed, the company found it necessary to increase the height of the railing leading from each side of the door out to the cars to keep people from jumping over. At the time of the accident the railing was strong, and the

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only evidence of any defect is the fact that the defendant, some three or more weeks after the accident, decreased the space between the railing and cars from 12 to 6 inches, by placing a plank or additional post at the corners where the railing turns to the right and left. The evidence of the engineer who constructed the road and depot shows that this post was put in for the sole purpose of giving strength to the railing. It is clear that no man of reason, and possessed of even a low degree of prudence, would, of his own volition, go in between this railing and the cars as the space existed at the date of the accident. But, for whatever purpose the new post was added, it was perfectly manifest that the want of it had no agency in causing the death of Mr. Evans. Had the post been there at that time, it could be argued that its presence increased the danger with as much plausibility as it is now argued that the want of it contributed to the death of Mr. Evans." It is clear that in that case the failure to put in the post did not cause Evans' death, but it cannot be said, as a matter of law, that the failure to have a railing across the open space of 26 inches, through which deceased in this case fell, did not contribute directly to his death. Had there been a railing to within 12 inches of the cars, it seems perfectly clear that he would have been able to recover himself, or would have been caught thereby in spite of himself. We do not think the cases are similar on their essential features. Again, *Carroll v. Transit Co.*, 107 Mo. 653, 17 S. W. 889, is cited. In that case Carroll boarded an elevated steam car in motion, by getting on the sheet-iron covering of the steps of the last platform on the train, and kept himself in that position, by holding to the iron gate that barred his entrance, until struck by a structure near the track, and knocked to the street below, and it was held he could not recover. The proximity of the cattle chute in that case was held not to be negligence, because the company had neither intended that its passengers should ride in such exposed places or winked at their doing so. But in this case deceased was viola-

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ting no regulation of the company. As said in the Evans Case, a railing was obviously necessary for the protection of passengers. Now, surely, it cannot be maintained that, because the portion it built was well constructed, this will absolve it from its duty to build sufficient to make it a protection to its patrons instead of a trap for their destruction. When it is agreed that a fence or railing is indispensable as a safeguard to the public desiring the travel over defendant's line, evidently it is meant a railing along the whole distance, save and except a reasonable space for the safe passage of the cars. What is a reasonable distance is a question of fact for the jury, under the evidence in this case. It was not essential to the plaintiff's recovery that she should prove what space ordinarily is left between the cars and railing by other similar companies. Elevated railroads are comparatively new in this country, and plaintiff might be at a loss to establish a custom; but if defendant had shown, which it did not, that this was the usual distance allowed by other roads of like character, this would not have prevented the jury finding that it was negligence in this case. The mere fact that other roads had been equally negligent would not be a defense to the action. *Dougherty v. Railway*, 128 Mo. 33, 30 S. W. 317, and cases cited.

5. We are thus brought to the consideration of the instruction No. 4, on the measure of damages given at the instance of plaintiff, already reproduced at length in paragraph 4 of this opinion.

Measure of
Damages.

The jury were instructed that, if they found for plaintiff, they would award her "such damage, not exceeding five thousand dollars, as you may deem fair and just under the evidence in this case, with reference to the necessary injury resulting to her from the death of her husband." This instruction was approved in *Browning v. Railroad Co.*, 124 Mo. 55, 27 S. W. 644, and *Boettger v. Iron Co.*, 124 Mo. 87, 27 S. W. 466. *McGowan v. Steel Co.*, 109 Mo. 518, 19 S. W. 199, is relied upon to convict the circuit court of error. The contention of the very able and learned

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counsel for defendant in this case only contended for an instruction in the words of the instruction herein complained of. Subsequently we ruled in the Browning Case, where the essential elements of the damages were given to the jury for the plaintiff in the language of the statute, its generality would not constitute reversible error, reserving to the defendant the right to point out the elements limiting the damages in its own instructions. Following that case, and Boettger-Iron Co. Case, in the same volume, this instruction must be held not to constitute error. Was error committed in refusing defendant's instruction which was in these words: "If the jury should find for the plaintiff, and that the deceased met his death on account of the negligence of the defendant in not having a sufficient railing on the elevated platform, they will assess the damages at such sum as will compensate her for the actual pecuniary loss which she has sustained by reason of the death of her husband, and nothing should be allowed for mental anguish, grief, or sorrow at the loss of her husband. The question in such case is as to the amount of pecuniary loss as shown by the evidence, and that means the actual amount in money which she has lost by reason of being deprived of the support of her husband." Plaintiff had no right to recover for mental anguish, grief, or sorrow which she suffered by the loss of her husband. This is the construction placed upon similar statutes throughout the country. Shear. & R. Neg. § 610; Field, Dam. § 630; Parsons v. Railway Co., 94 Mo. 286, 6 S. W. 464. But the propriety of the instruction in other respects is denied. If unsound principles of law have been incorporated in the instruction by the defendant, it was not error in the circuit court to refuse it or to fail to give a correct instruction of its own motion. In civil cases it is not the duty of the trial court to instruct of its own motion if the parties neglect to ask proper instructions. Unlike the Browning Case, *supra*, or the Tetherow Case, 98 Mo. 74, 11 S. W. 310, defendant has sought to lay down the elements which may enter

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into the estimate of damages which plaintiff may recover, and we are again confronted with the necessity for construing our statute on this subject. A review of the decisions of this court, and a comparison of our statute with Lord Campbell's act and similar statutes of various states of our Union, discloses that the general assembly has not adopted any of those acts in their entirety, and, while we may profit by the construction placed upon them by their courts, we must note the difference between them and the language of our own statute, and endeavor to ascertain what the purpose of the departure from those statutes was. Lord Campbell's act prescribed that "in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whose benefit such action shall be brought." 9 & 10 Vict. c. 93 (1846). That act was construed, in 1852, in *Blake v. Railway Co.*, 18 Adol. & E. (N. S.) 93, and it was held that, in estimating damages to the surviving relatives, the jury could not take into consideration their mental suffering or loss of society, but must give compensation for pecuniary loss only. It was held that the statute gave the surviving relatives a new right of action, and hence nothing could be recovered for the loss or suffering of the deceased himself, but only for those injuries resulting to his family a pecuniary estimate of which could be made. The statute of New York (Laws 1849, p. 388) provided: "The jury may give such damages as they shall deem a fair and just compensation, not exceeding \$5,000, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person." In *Tilley v. Railroad Co.*, 24 N. Y. 471, the court of appeals, through JUDGE DENIO, in construing this statute, said: "The difficulty upon this point arises from the employment of the word 'pecuniary' in the statute; but it was not used in a sense so limited as to confine it to the immediate loss of money or property, for, if that were so, there is scarcely a case where any amount of damages could be

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recovered. It looks to prospective advantages of a pecuniary nature which have been cut off by the premature death of the person from whom they would have proceeded, and the word 'pecuniary' was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most painful and grievous to be borne, cannot be measured or recompensed by money." "It excludes also those losses which result from the deprivation of the society and companionship of relatives, which are equally incapable of being defined by any recognized measure of value." Now our statute (section 4427, Rev. St. 1889) gives "such damages, not exceeding five thousand dollars, as they [the jury] may deem fair and just with reference to the necessary injury resulting from such death, having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default." It is now the settled rule of decision in this court that where there is neither allegation of malice, wickedness, or wantonness in the tort complained of, nor evidence of any aggravating circumstances, it is improper in the instruction to include the words "having due regard to the mitigating or aggravating circumstances." Those words are only proper in a case in which punitive damages or smart money may be allowed. *Stoher v. Railway Co.*, 91 Mo. 509, 4 S. W. 389; *Parsons v. Railway Co.*, 94 Mo. 286, 6 S. W. 464. On the other hand, it has been uniformly held that exemplary damages may be allowed under this statute, within the limits of the penalty affixed. *Nichols v. Winfrey*, 79 Mo. 545; *Gray v. McDonald*, 104 Mo. 302, 16 S. W. 398; *Vawter v. Hultz*, 112 Mo. 633, 20 S. W. 689. With these expositions of the statute, let us recur now to the defendant's instruction. The most casual reading will show that it excludes all idea of prospective damages of a pecuniary nature, and limited the widow's recovery to the immediate damages suffered, or, at least, those up to the trial only. That such an instruction is incorrect, even under a statute like that of New York, which

Note

limits the damages to those pecuniary only, in express terms, is apparent from the Tilley Case. JUDGE DENIO held it looked to prospective damages, and there is nothing in the phraseology of our act which restricts the right of recovery to the present actual loss of money to the plaintiff. The words "necessary injury" in our statute are broad enough to include any damages which may be estimated according to a pecuniary standard, whether present, prospective, or proximate. While it may not be feasible for the trial courts to define with exactness the rule of damages, applicable to the loss of a husband or wife, to the jury, with a knowledge of the character, habits of deceased, station in life, business, etc., much is necessarily left in arriving at a just conclusion. While defendant was justly entitled to an instruction warning the jury that they were not authorized to award plaintiff any damages for the pain and anguish she suffered by the tragic death of her husband, it was not entitled to restrict her compensation to the mere present money loss she had suffered, and hence its instruction was erroneous, and on error was committed in refusing it. In *Parsons v. Railway Co.*, 94 Mo. 286, 6 S. W. 464, this court said there was "a class of cases in which the damages, in the nature of things, must be largely conjectural, and for that reason not susceptible of approximate admeasurement, as, for instance, when the husband is suing for the death of his wife, or the wife for the death of her husband, and the value of the daily ministrations of a whole life is to be estimated." Having carefully examined every assignment of error presented by defendant, we find no reversible error in the record, and hence affirm the judgment of the circuit court.

Same.

SHERWOOD and BURGESS, JJ., concur.

NOTE.

Elevated Railroads—Open Gates.—An open gate of the car of an elevated railway company is an invitation to passengers that they may enter with safety, and a passenger is not chargeable with con-

Note

tributory negligence in attempting to board a train while the gate is open, and where no signal has been given of the intention to start the train. *Schestrauber v. Manhattan R. Co.*, 9 N. Y. S. R. 215, 44 Hun 628; *affirmed* in 112 N. Y. 664, *mem.*, 20 N. E. Rep. 413, 20 N. Y. S. R. 978.

Duty of Carrier to Allow Reasonable Time for Boarding and alighting from Train.—A carrier of passengers, more especially where the mode of locomotion is by railway, is in duty bound to allow passengers a reasonable time for ingress and egress; and should injury occur through the failure of the carrier to perform its duty in this respect, the passenger is plainly entitled to damages, where a question of contributory negligence does not intervene.

United States.—Washington, etc., R. Co. *v. Harmon*, 147 U. S. 571.

Alabama.—Central R., etc., Co. *v. Miles*, 88 Ala. 256; *Montgomery, etc., R. Co. v. Stewart*, 91 Ala. 421.

California.—Carr *v. Eel River, etc., R. Co.*, 98 Cal. 366.

Colorado.—Denver Tramway Co. *v. Owens*, 20 Colo. 107.

Connecticut.—Fuller *v. Naugatuck R. Co.* 21 Conn. 557.

Illinois.—Toledo, etc., R. Co. *v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71; *Chicago City R. Co. v. Mumford*, 97 Ill. 560; *Chicago West Div. R. Co. v. Mills*, 105 Ill. 63; *Wabash, etc., R. Co. v. Rector*, 104 Ill. 296; *Chicago, etc., R. Co. v. Arnol*, 144 Ill. 261; *Illinois Cent. R. Co. v. Taylor*, 46 Ill. App. 141; *North Chicago St. R. Co. v. Cook*, 145 Ill. 551.

Indiana.—Jeffersonville R. Co. *v. Hendricks*, 26 Ind. 228; *Jeffersonville, etc., R. Co. v. Parmalee*, 51 Ind. 42; *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *Louisville, etc., R. Co. v. Wood*, 113 Ind. 544.

Iowa.—Patterson *v. Omaha, etc., R., etc., Co.*, 90 Iowa 247.

Massachusetts.—Brooks *v. Boston, etc., R. Co.*, 135 Mass. 21.

Michigan.—Michigan Cent. R. Co. *v. Coleman*, 28 Mich. 440; *Flint, etc., R. Co. v. Stark*, 38 Mich. 714; *Wood v. Lake Shore, etc., R. Co.*, 49 Mich. 370.

Minnesota.—Keller *v. Sioux City, etc., R. Co.*, 27 Minn. 178.

Mississippi.—Southern R. Co. *v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332; *New Orleans, etc., R. Co. v. Statham*, 42 Miss. 607, 97 Am. Dec. 478; *Dorrah v. Illinois Cent. R. Co.*, 65 Miss. 14, 7 Am. St. Rep. 629, 30 Am. & Eng. R. Cas. 576.

Missouri.—Straus *v. Kansas City, etc., R. Co.*, 75 Mo. 185, *affirmed* 86 Mo. 421; *Swigert v. Hannibal, etc., R. Co.*, 75 Mo. 475; *Dougherty v. Missouri R. Co.*, 81 Mo. 325, 51 Am. Rep. 239, 21 Am. & Eng. R. Cas. 497; *Weber v. Kansas City Cable R. Co.*, 100 Mo. 194, 18 Am. St. Rep. 541; *Madden v. Missouri Pac. R. Co.*, 50 Mo. App. 666.

New York.—Dillon *v. Manhattan R. Co.*, (Supreme Ct.) 16 N. Y. St. Rep. 767, 49 Hun (N. Y.) 608; *Mulhado v. Brooklyn City R. Co.*, 30 N. Y. 370; *Filer v. New York Cent. R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327; *Keating v. New York Cent., etc., R. Co.*, 49 N. Y. 673; *Bucher v. New York Cent., etc., R. Co.*, 98 N. Y. 128; *Sauter v. New York Cent., etc., Co.*, 6 Hun (N. Y.) 446; *Roberts v. Johnson*, 58 N. Y. 613; *McDonald v. Long Island R. Co.*, 116 N. Y. 546, 15 Am. St. Rep. 437. See also *Flanagan v. New York, etc., R. Co.*, (Supreme Ct.) 29 N. Y. St. Rep. 543, 55 Hun (N. Y.) 611, 5 Silv. Sup. Ct. (N. Y.) 495, *affirmed* 125 N. Y. 773, 36 N. Y. St. Rep. 1011.

Pennsylvania.—Pennsylvania R. Co. *v. Kilgore*, 32 Pa. St. 294, 72 Am. Dec. 787; *Fairmount, etc., Pass. R. Co. v. Stutler*, 54 Pa.

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St. 375, 93 Am. Dec. 714; Dunn v. Pennsylvania R. Co., 20 Phila. (Pa.) 258.

Texas.—Houston, etc., R. Co. v. Gorbett, 49 Tex. 573.

Virginia.—Norfolk, etc., R. Co. v. Groseclose, 88 Va. 267, 29 Am. St. Rep. 718.

Wisconsin.—Davis v. Chicago, etc., R. Co., 18 Wis. 175; Imhoff v. Chicago, etc., R. Co., 20 Wis. 344.

New Brunswick.—Hall v. McFadden, 19 New Bruns. 340.

DAVIS

v.

TEXAS & P. RY. CO.

(*Supreme Court of Texas, Feb. 28, 1898.*)

Injury to Cattle—Failure to Furnish Cars—Liability of Carrier.*—The fact that an unusually large number of cattle are being shipped over a railroad does not relieve the company from liability for a breach of its contract to furnish a shipper within a reasonable time with a sufficient number of cars for the transportation of his cattle.

Same—Failure to Consider Assignments of Error.—In an action against a railroad company for damages to cattle resulting from its failure to furnish means of transportation within a reasonable time, it is error to refuse to consider upon plaintiff's assignments of error merely upon the grounds that the statement of facts contains no proof as to the amount of damages caused by defendant's negligence, and that the verdict for defendant is not attached in such assignments.

ERROR by plaintiff to court of civil appeals of Fourth supreme judicial district. *Reversed.*

T. A. Falvey and *Walter Davis*, for plaintiff in error.

Edwards & Edwards, for defendant in error.

DENMAN, J. Davis brought this suit against the Texas & Pacific Railway Company to recover damages for injuries to cattle shipped from Ft. Hancock to Colorado City, Tex. The petition alleged: (1) That defendant agreed to have at Ft. Hancock a sufficient number of cars to promptly

Case Stated.

*As to Duty of Carrier to Furnish Cars, see Leonard v. Whitcomb, et al., Wis., 7 Am. & Eng. R. Cas., N. S., 520, and note 1 p. 524.

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receive and transport plaintiff's cattle upon their arrival there; that plaintiff gave defendant notice of the time the cattle would arrive in ample time for it to have furnished such cars according to the agreement, and was assured by its agent that the cars would arrive by 12 o'clock, November 4, 1895; that thereupon plaintiff, at defendant's instance, placed in the pens as many cattle as they would hold, and held the balance of the herd near by awaiting the arrival of the cars; that no cars arrived until noon of the following day, and in the meantime plaintiff was compelled to hold said cattle in said pens and under herd, without food or water, constantly expecting the arrival of the cars; that, when plaintiff began to load, defendant did not furnish sufficient cars to promptly load all the cattle, whereby plaintiff was compelled to hold his herd in and around the pens several days, waiting for cars, whereby the cattle were greatly injured, to plaintiff's damage \$10,000. (2) That plaintiff tendered his said cattle to defendant for shipment as aforesaid, and defendant agreed and was bound as common carrier to promptly receive and carry same with reasonable care, and promptly deliver same in as good condition as when received; that defendant failed to do so, but negligently failed to furnish transportation, and carelessly handled the cattle on the route, so that they were greatly injured in the particulars pointed out in the petition, to plaintiff's damage in the aggregate \$17,500. Defendant answered by exceptions, general denial, and many special pleas, among which were pleas setting up the matters referred to in the charges hereinafter set out. It may be conceded that there was evidence tending to support such petition and pleas, as no question is here made upon that point. The court charged the jury, in effect, that there was a variance between the allegations in said first count of the petition and the proof in regard to the contract for cars, and therefore declined to submit that phase of the case to the jury. Plaintiff complains of that action of the court, but, as the petition can be amended so as to avoid that difficulty on another trial, we

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do not deem it necessary to determine the question. The court thereupon submitted the case to the jury upon the second count in the petition, seeking to hold defendant liable for breach of its duties as common carrier, and the jury found for defendant; whereupon the court rendered judgment against plaintiff, that he take nothing and pay all costs. Plaintiff having appealed to the court of civil appeals, and that court having affirmed the judgment of the trial court, he has brought the case to this court upon writ of error.

Error is assigned upon the giving by the court of the following charge: "If you believe, from the evidence, that at the time the said cattle arrived at Ft. Hancock, and during the time the shipment of the cattle was in progress, the defendant was then having an unusually large number of cattle shipments from El Paso and other points upon its road, and that by reason of that fact said defendant was prevented from providing more engines and cars for the shipment of these cattle than it did furnish, then you are instructed that such fact would excuse the defendant from providing more engines and cars than it did provide for the shipment of these cattle." Our Revised Statutes of 1895 provide:

"Article 4494. Every such corporation shall start and run their cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all such passengers and property as shall within a reasonable time previous thereto offer or be offered for transportation at the place of starting, and the junction of other railroads, and at sidings and stopping places established for receiving and discharging way passengers and freights, and shall take, transport and discharge such passengers and property at, from and to such places on the due payment of the tolls, freight or fare legally authorized therefor."

"Article 4496. In case of the refusal by such corporation, or their agents so to take and transport any passenger or property, or to deliver the same, or either

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of them, at the regular appointed time, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of suit, and in case of the transportation of property shall in addition pay to such party special damages at the rate of five per cent. per month upon the value of the same at the time of shipment, for the negligent detention thereof beyond the time reasonably necessary for its transportation: provided, that in all suits against such corporation under this law the burden of proof shall be on such corporations to show that the delay was not negligent."

Under these provisions, as soon as "a reasonable time" elapsed after the cattle were "offered for transportation," it became the duty of the defendant to "furnish sufficient accommodations for the transportation of" same, and a breach of such duty rendered it liable to plaintiff for "all damages * * * sustained thereby, with costs of suit." If plaintiff established (1) that the cattle were offered for transportation "within a reasonable time," (2) that he paid or satisfied the company for the freight, and (3) that defendant did not furnish "sufficient accommodations," he placed defendant in default, and was entitled to damages and costs. What was a "reasonable time," in the absence of an agreement, was a question of fact for the jury, and depended upon all the circumstances, such as the place and character of the shipment, and the amount of freight being then offered and on hand for transportation at that and other points on the line, etc. Instead of leaving the question to the jury as to whether the time was reasonable, as shown by all the circumstances, the court erred in the charge

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quoted by informing them that defendant would be excused, in law, if they found that defendant "was then having an unusually large number of cattle shipments from El Paso and other points upon its road," and that such fact prevented it from furnishing the cars. The same may be said of the charge in regard to the engine. In deter-

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mining the question of the reasonableness of the time, all the incidents of the service, such as the probable breaking of machinery, etc., are circumstances for the jury. For the error in the charge quoted, the judgments of the trial court and court of civil appeals will be reversed, and the cause remanded.

It is proper to note that the court of civil appeals did not approve the charge, but declined to consider any of the assignments of error, upon the ground that the statement of facts contains no proof as to the amount of damages resulting to plaintiff from the injuries shown to have been inflicted upon his cattle, and plaintiff did not, in his assignments, attack the verdict. We are of opinion that these facts did not justify the refusal to consider the assignments. If plaintiff established the facts above indicated, he was entitled to nominal damages and costs, and the erroneous charge, depriving him of such a verdict, was cause for reversal, though he may have made no proof showing that he was entitled to an additional amount as actual damages. He may have been content to waive the latter. If the charge was erroneous, and probably led to the verdict, the proper practice is to assign error upon the charge, and we see no necessity of also attacking the verdict.

Same—Failure to
Consider Assign-
ments of Error.

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*v.*SIOUX CITY & P. RY. CO. *et el.*

HOLLOWAY

v.

SAME.

BROWN

v.

SAME.

MACOY

v.

SAME.

(Supreme Court of Iowa, Jan. 27, 1898.)

Common Carriers—Joint Rates—Discrimination—Construction of Statutes.—The law of Iowa as to discriminating rates for the transportation of freight by railroads applies where railway companies voluntarily fix joint rates.

Same—Constitutionality.—And the law of Iowa providing for the punishment of common carriers for fixing discriminating rates is constitutional.

Same—Answers to Interrogatories—Affidavits by Corporations.—A corporation is a “party” within the meaning of the section of the code of Iowa which requires the answer to interrogatories annexed to a petition to be verified by the affidavit of the “party” answering.

Same—Amended Petitions.—Such interrogatories may be annexed to an amended petition.

Objections to Affidavit—Appeal.—An objection that an affidavit was not made by plaintiff but by his attorney cannot be raised for the first time in the supreme court.

Answers to Interrogatories.—It was not error to strike out answers to interrogatories which showed on their face that no attempt had been made in good faith to answer them fairly and candidly.

Penal Statutes*—Liability—Interest on Damages.—Liability for damages under a penal statute should be limited to the amount fixed by the statute; and where the statute does not provide for the payment of interest from the time the right of action accrues to the party injured it is error to allow such interest.

*See Hall *v.* Norfolk & Western Railroad Co. 8 Am. & Eng. R. Cas. p. 632 and note p. 638.

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APPEAL by defendants from Pottawattamie county district court. *Affirmed.*

Hubbard & Dawley, for appellants.

Harl & McCabe and *Spencer Smith*, for appellees.

PER CURIAM. 1. These four cases are presented on one record, and are to be disposed of in one opinion. The pleadings and rulings and the orders and judgments entered are alike in each case, Case Stated. save and except as to the amount involved, and as to the amount of the judgments. The pleadings and rulings cover 64 printed pages, and the statement of them by appellants covers 15 printed pages. It will therefore be seen that it is not practicable to set out even a full summary of them, but we shall endeavor to make a statement of the material portions, and of the rulings, to the end that what we may say may be correctly understood and properly applied.

These plaintiffs, between January 1, 1889, and the bringing of these suits, in 1893, shipped baled hay from Whiting and Blencoe, Iowa, stations on the line of the Sioux City & Pacific Railway, to Council Bluffs, Iowa, a station on the line of the Chicago & Northwestern Railway. The original petition charged that the defendants "charged, demanded, and received of plaintiff for said shipments the sum of two local tariffs, of said lines from Whiting (or Blencoe) to Missouri Valley, and from Missouri Valley to Council Bluffs; that, at and about the time said shipments of baled hay were made, * * * the defendant corporations were charging on shipments of baled hay from said stations of Whiting (and Blencoe) to points on the Chicago & Northwestern Railway east of Missouri Valley, and for the like distance from the point of shipment as Council Bluffs, the joint-rate tariff fixed by the board of railway commissioners of the state of Iowa, which joint-rate tariff was less for like distance than the sum of the two locals charged by these defendants on shipments made at about the same time, of the same merchandise, and for like distance, to points on the line of defendants' roads."

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It then stated that the charge of the sum of the two local tariffs as aforesaid was in excess of the joint rate for like distances as fixed by the railway commission; that said charge was a violation of the joint-rate law, and constituted an unjust discrimination, and was an unreasonable and extortionate charge; that plaintiff was damaged by reason of said extortionate and unjust charges and discrimination, and charges in excess of joint rates fixed by said railway commissioners, a certain sum, which was stated; that, more than 15 days before the commencement of this action, written notice and demand were made upon each of said defendants for the amount of damages accruing to plaintiff on each of said shipments, and defendants have failed to pay the same, whereby they have become liable to plaintiff in three times the amount of the said damages; and judgment is claimed for said sum. The defendants demurred to these petitions upon the ground that there was no law requiring the defendants to make a joint rate for the shipment of freight over their lines; that the provisions of chapter 28, Acts 22d Gen. Assem., and of chapter 17, Acts 23d Gen. Assem., are unconstitutional, being in violation of the federal and state constitutions; that the board of railway commissioners had no authority to fix a joint rate for shipments over the defendants' lines of railway; that it was not unlawful for each of the defendants to charge its regular local tariff rate for transporting said hay; that it was not unlawful for the defendants to charge in the aggregate for said shipments the sum of two local tariffs on said lines; that it was not averred that the board of railway commissioners had given notice to defendants of the hearing at which the alleged joint rates were fixed; and that there is no joint liability of the defendants shown by the petition. Said demurrer was overruled, and thereafter plaintiff filed an amendment to his petition, alleging "that the shipments which have been referred to in the petition herein were through shipments from Whiting to Council Bluffs; that through billing was issued therefor, and a through rate for the transportation

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thereof fixed, demanded, and received by the defendants; that the said rate so fixed, demanded, and received by the defendants for transportation of said hay equaled the sum of the two local tariffs from Whiting to Missouri Valley, and from Missouri Valley to Council Bluffs, and that said charge was unreasonable, unjust, extortionate, and discriminating, in excess of joint rate fixed by the board of railway commissioners of the state of Iowa, and in excess of the joint rates fixed and charged by the defendants for joint shipments of like character for like distance on their respective lines at or about the time of the shipments in controversy herein, as is more fully alleged in plaintiff's original petition." To the petition as amended the defendants again demurred, for substantially the same reason set out in the first demurrer. Before this demurrer had been ruled upon, the plaintiff again amended his petition, alleging: That the through billing of the hay was made by defendants in pursuance of a contract or agreement entered into between defendants for the through transportation of freight over their respective lines, and establishing between them joint through rates for such transportation of freight from points on the Sioux City & Pacific Railway to points on the line of the Chicago & Northwestern Railway, and from points on the latter railway to points on the former railway, and providing for a division of such through rates in proportion to the mileage of said shipments over each of said respective lines; said contract covering all points in Iowa on their respective lines. That said freight was received in pursuance of said agreement by said Sioux City & Pacific Company; it, under said contract, fixing a through rate therefor, and collecting the same, and thereafter making division thereof with its co-defendant pursuant to said contract. "That said through joint rate on said shipments so charged to this plaintiff exceeds 80 per cent. of the sum of the two locals from the point of shipment to Missouri Valley, and from Missouri Valley to Council Bluffs." That, during the entire period covered by the shipments referred to, the defendants,

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on their through shipments to points on the line of the Chicago & Northwestern Railway east of Missouri Valley, charged, as a through joint rate, 80 per cent. of the two local tariffs from the point of shipment to Missouri Valley, and from Missouri Valley to the point of destination. The defendants filed a motion to strike a part of this amendment. The demurrer and the motion to strike were overruled. A motion which had previously been made for the production of books and papers was by agreement sustained. Thereupon the defendant the Chicago & Northwestern Railway Company filed its answer, admitting that plaintiff shipped the hay claimed at and for the rates, charges, and prices stated in the petition. Admits that on joint shipments over the Sioux City & Pacific Railroad from Whiting to Missouri Valley, and thence east from the Valley over the Chicago and Northwestern Railway, they charged 80 per cent. of the sum of the two locals, as alleged. Admits the service of the written notice and demand. Admits that plaintiff's shipments were made on a through billing, by virtue of an agreement between the defendants, and that the rates charged were divided between them in pursuance of such agreement. And admits that said joint through rate on said shipments so charged the plaintiff for a greater portion of the time exceeded 80 per cent. of the sum of the two locals; that from July 9, 1890, to April, 1893, the rate was less than 80 per cent. of the two locals. Admits that, during the entire period covered by the shipments of plaintiff, the defendants, on their through shipments to points on the line of the Chicago & Northwestern Railway east of Missouri Valley, charged, as a through joint rate, 80 per cent. of the two local tariffs from the point of shipment to Missouri Valley, and from Missouri Valley to the point of destination. Avers that the rate charged plaintiff was less than the sum of the two local tariffs between the points heretofore mentioned; that on July 9, 1890, the defendants put in operation a special joint tariff on baled hay of \$.0544, and all shipments of plaintiff after that date

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were made under such joint tariff. Avers that, during all of the time of the shipments made by the plaintiff as alleged by him, the defendants had the lawful right to charge its local tariff from Missouri Valley to Council Bluffs on said shipments, and denies that the charge made and collected of the plaintiff was unlawful, or that it constituted discrimination, extortion, or an unreasonable charge. Avers that from February, 1889, the distance tariff and classification made by the Iowa railroad commissioners have been in force over the defendants' lines, and that it has not made any charge in excess thereof, and that such rates were reasonable, by force of the statutes of the state.

The plaintiff filed a further amendment to his petition, alleging that the tariff charged by the defendants on shipments to points on their lines of road east of Missouri Valley was less than the sum of the two locals, and less than the tariff charged plaintiff on shipments of the same kind for like distances to Council Bluffs; that the amounts charged to plaintiff on such shipments referred to in the petition exceeded the tariff charged for like shipments at and about the same time, and for like distances, to points east of Missouri Valley, by the amount claimed as overcharged in the petition. The defendant filed a motion and a demurrer to the petition and amendments. The demurrer was, in effect, the same as the one before referred to. Prior answers filed were withdrawn, and the demurrer was overruled, whereupon the defendant refiled its answer. The defendant also answered in denial of the facts stated in the last amendment. Thereupon the plaintiff filed a further amendment, as a substitute for a prior one, and in substantially the same language, which pleading was verified by one of the plaintiff's attorneys, and there was annexed thereto interrogatories to be answered by the defendant. Thereafter defendant moved to strike said amendment, which motion was overruled, and the defendants were given 10 days in which to answer the interrogatories. Defendant then filed an answer to said amendment, denying the allega-

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tions therein contained. On the same day, defendant filed objections and exceptions to the interrogatories, because the same were not attached to plaintiff's original petition; because the statute did not require a corporation to answer interrogatories attached to pleadings; because all of them were immaterial, irrelevant, and incompetent. This motion was overruled, and the defendant allowed 10 days to answer the interrogatories. After the expiration of the 10 days, plaintiff moved to strike the answer from the files because the defendants had failed and refused to conform to the order and rule of the court requiring them to produce books and papers, and because they had neglected and refused to answer the interrogatories. Thereafter the court granted the defendant leave to answer interrogatories without prejudice to plaintiff's motion to strike, whereupon the defendant filed its answers to said interrogatories. Nearly all of the answers were in the following language: "I do not know; and I further state that I know of no officer of the defendant corporation that has actual, personal knowledge of the facts called for in this interrogatory." These answers were sworn to by the general manager of the defendant, who says "that the information required by the said interrogatories is not within my actual, personal knowledge, nor the actual, personal knowledge of any officer of this answering defendant corporation." Thereupon the plaintiff moved to strike said answers because they were a manifest and palpable evasion and disregard of the order of the court; because the answers are shown to be made by a person having no knowledge from which to make answer; said answers do not pretend to give the information and knowledge of the defendant with reference to the matters that were the subject-matter of the interrogatories. This motion was sustained, and defendant ordered to make full and candid answers to said interrogatories before August 27, 1895. The defendant then filed an answer to said interrogatories, averring that its answers theretofore filed were full, candid, and true, and reiterated the same as its

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answer. Another motion to strike this last answer was filed by plaintiff because the answer was immaterial, irrelevant, and flippant. Thereafter the court entered an order striking the amended answer to interrogatories from the files, and also ordered that, as defendant had failed to file full and candid answers to the interrogatories, as required by the court, in default thereof the answer filed in the case by the defendant should be quashed and stricken from the files. Thereafter defendant was adjudged to be in default, and on the pleadings and proof adduced by the plaintiff a judgment was entered in each case against the defendant, which was ordered to draw 6 per cent. interest from its date. The defendant excepted to the judgment, and to all rulings made against it.

2. Appellants' counsel contend that the petition cannot be treated as stating a cause of action for discrimination under the common law. We are satisfied that no such claim is made in the pleadings. We think the cause of action is based upon the statute. It is not to be denied that the petition and the several amendments thereto are not as clear and definite in statement, fixing the basis of the cause of action, as they might be. A careful consideration of all of the pleadings leads us to the following conclusions: The original petition undertook to state a cause of action (1) for violation of joint rates which were fixed by the board of railway commissioners; (2) for a violation of the joint-rate law; (3) for unjust discrimination, extortion, etc. A further paragraph in the petition, as to damages, sustains our view of the purpose of the pleader. It reads: "That plaintiff was damaged by reason of said extortionate and unjust charges and discrimination, and charges in excess of the joint rates fixed by the board of railway commissioners," etc. This action was commenced before this court had determined the case of *State v. Railway Co.*, 90 Iowa, 594, 58 N. W. 1060. By subsequent amendments to the petition, the claim for recovery, so far as it had theretofore been based upon the thought that the rates

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charged were in excess of the joint rates fixed by the railway commissioners, seems to have been abandoned. These amendments placed plaintiff's right to recover upon two grounds: (1) That the defendants had voluntarily established joint rates between the points named in the petition and Council Bluffs, and likewise between the shipping points and points on the line of the Chicago & Northwestern Railway east of Missouri Valley, and that said joint rates charged the plaintiff on his shipments to Council Bluffs constituted an unjust discrimination against him as to his said shipments from Whiting to Council Bluffs; and (2) that said rates so charged the plaintiff were unreasonable and extortionate, and in violation of the joint-rate law. Inasmuch as by the amendments it appears that the rate in fact charged the plaintiff was less than the rate fixed by the railway commission, it is clear that, upon the issues as finally made, there could have been no intent to claim a recovery on an alleged charge greater than that fixed in said commission's rates. As we view the pleadings, both the original petition and the amendments stated a cause of action for discrimination; and in the amendments the further cause of action was stated, that these defendants had voluntarily established a joint rate over their lines of railway, and that they had charged the plaintiff a rate in excess of the same joint rate, on like shipments, at the same time, which were made to other points, for a like distance, over their lines of road. Appellant contends, and correctly, that the joint rates attempted to be established by the board of railway commissioners under chapter 17, Acts 23d Gen. Assem., were held void and of no effect. *State v. Railway Co., supra*. In that case the validity of the joint-rate law was not passed upon. The holding was, in effect, that, if the law was valid, the joint rates attempted to be established by the railway commission were invalid, because notice was not given to the railway companies as the statute required. In the same case it was said that chapter 28, Acts 22d Gen. Assem., did not refer to joint rates. What was said

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in that case was with reference to the authority or power of the commissioners to fix a joint rate. That was the subject under consideration. In Acts 17th Gen. Assem. c. 77, § 12, it is provided that "no railroad company shall charge, demand or receive from any person, company or corporation an unreasonable price for the transportation of * * * property * * *."

The next section of the same act provided, as a punishment for a violation of the provisions of the act, that such violation should forfeit to the party aggrieved three times the actual damages sustained or overcharges paid, with costs and attorney's fees. By Acts 22d Gen. Assem. c. 28, which in terms applies to all cases of the transportation of property by railroads within the state, it is provided that "all charges made for any service rendered * * * in the transportation of * * * property in this state, * * * shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared unlawful."

"If any common carrier subject to the provisions of this act, shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered * * * in the transportation of * * * property subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing * * * a like and contemporaneous service in the transportation of a like kind of traffic, such common carrier shall be deemed guilty of unjust discrimination * * *." Acts 22d Gen. Assem. c. 28, § 3. Section 4

of the same act prohibits the giving of any preference or advantage to any particular person or locality in any respect whatsoever, and likewise prohibits the subjecting of any person or locality to any prejudice or disadvantage in any respect. In section 5 of the same act it is provided: "And said common carrier shall charge no more for transporting freight to or from any point on its railroad than a fair and just rate as compared with the price it charges for the same kind of freight

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transportation to or from any other point." By section 9 of the same act the violation of the provisions of the chapter are made to subject the offending carrier to three times the amount of the damages sustained with costs and attorney's fees.

Appellant contends, and appellee seems to concede, that the foregoing provisions had in contemplation single lines of railway, and had no applica-
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struction of
Statutes.
 tion to joint rates voluntarily established between two or more lines of railway. The language used is broad enough to apply to and cover all shipments, whether made over a single line, or over two or more lines, and we think the provisions quoted are as applicable to the one case as to the other. There is nothing in *State v. Railway Co.*, *supra*, at all in conflict with this holding. As we have indicated, the sole question considered in that case, so far as it dissented the provisions of chapter 28, Acts 22d Gen. Assem., was that that chapter did not make provisions for the compulsory fixing of joint rates. That opinion recognizes the fact that chapter 28 contemplated that railway companies might voluntarily make joint rates. We discover no reason why the provisions of the act of the 22d general assembly as to discriminations, and the punishment therefor, should not be applied to cases wherein the railway companies voluntarily fix joint rates. That such was the intention of the legislature is plain, for in section 1, c. 17, Acts 23d Gen. Assem., it is provided "that chapter 28 of the Acts of the Twenty Second General Assembly be and the same hereby is amended as follows: That said chapter 28 of the Acts of the Twenty Second General Assembly shall not be construed to prohibit the making of rates by two or more companies for the transportation of property over two or more of their respective lines of railroad within this state, and a less charge by each of said railroad companies for its portion of such joint shipment than it charges for a shipment for the same distance wholly over its own line within the state, shall not be considered a viola-

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tion of said chapter 28 of the Acts of the Twenty Second General Assembly, and shall not render such railroad company liable to any of the 'penalties of said act, but the provisions of this section shall not be construed to permit railway companies, establishing joint rates, to make by such joint rates any unjust discrimination between the different shipping points or stations upon their respective lines between which joint rates are established, and any such unjust discrimination shall be punished in the manner and by the penalties provided by chapter 28 of the Acts of the 22nd General Assembly.'" If this section is valid and in force, it also clearly covers a case of discrimination under a voluntary joint rate. It is contended that this whole chapter 17, Acts 23rd Gen. Assem., providing for joint rates, is unconstitutional and void. The constitu-
Same—Constitutionality.
tionality of this entire act was upheld in Railway Co. v. Dey, 82 Iowa, 312, 48 N. W. 98. In that case JUDGES ROTHROCK and ROBINSON dissented from the holding as to a part of the statute. As to section 1 of the act, however, the court was united in holding it constitutional. On the second appeal in the same case (89 Iowa, 13, 56 N. W. 267) the former opinion was adhered to as being the law of the case. In that opinion the writer said: "In thus disposing of this case, we are not to be understood as approving of the correctness of the former holding. Some of us are content with the result reached in the former opinion; others (the writer included) do not approve of some of the reasoning and conclusions found in the opinion rendered by a majority of the court as then constituted, and do not wish to be bound by it in any other case." Whatever might be the views of a majority of this court, as now constituted, as to other sections of chapter 17, Acts 23d Gen. Assem., we have no doubt of the constitutionality of section 1 of the act. In the case at bar the validity of other sections of the act is not involved, and hence not decided. The sections heretofore quoted clearly define what shall be deemed discrimination. It cannot be doubted that the facts

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recited in the petition, as well as in the amendments thereto, make a prima facie case of violation of the statute as to discrimination. The plaintiff, shipping hay from Whiting to Council Bluffs, was charged more than the defendant charged others for a like service, at the same time, for shipments the same distance between points on the Sioux City & Pacific Railway and points on the Chicago & Northwestern Railway. The demurrers were properly overruled. We are not determining whether or not, when joint rates are thus voluntarily established, the railway companies might not, under some circumstances, charge one person more for carrying the same kind of freight a like distance than they charge another person. Whether such discrimination would be "unjust discrimination," within the meaning of section 1, c, 17, Acts 23d Gen. Assem., we need not here decide. Such discrimination would be presumably unjust.

3. Error is assigned upon the rulings of the court requiring the defendants to answer the interrogatories attached to the plaintiff's amended petition.

Same—Answers to
Interrogatories—
Affidavits by Corpo-
rations.

It is said that corporations cannot make answers to interrogatories provided by our statute to be annexed to pleadings, and that no provision is made requiring them to make answers thereto. The statute provides that either party may annex to his petition, answer, or reply, written interrogatories to any one or more of the adverse parties, concerning any of the material matters in issue in the action, the answer to which, on oath, may be read by either party as a deposition between the party interrogating and the party answering. Code, § 2693. The party answering may, in addition to responding to the interrogatories, state any new matter concerning the cause of action. *Id.* § 2694. The answer to the interrogatories must be verified by the affidavit of the party answering, to the effect that the statements in them made of his own personal knowledge are true, and those made from information he believes to be true. *Id.* § 2698. Appellants' counsel seem to discover a

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difficulty, under the statute, in requiring a corporation to answer, because by the statute the answer is to be made by a "party," and that party is to verify the answers; that the answers are to be used as testimony, and that only human beings can give testimony (*Id.* § 3636); that a corporation, being an artificial person, cannot give testimony, nor take an oath, nor be convicted of perjury. We may add that the same can be said of a co-partnership. These and other objections made do not impress us as showing that the legislature did not intend these provisions of the statute to apply to corporations. The objections are purely technical, and without real merit. The statute is general in terms, its language is broad enough to apply to a corporation as to a person, and we are not authorized to ingraft upon it, by construction, an exception which it does not appear that the legislature intended to make, and which the policy of the law clearly dictates should not be made. This precise question has never been determined by this court, but it was said in *Gollobitsch v. Rainbow*, 84 Iowa, 567, 51 N. W. 48, "When the party to whom the interrogatories are addressed is a corporation, the answer must necessarily be given by a duly-authorized officer or representative." We held in *Bailey v. Railway Co.*, 62 Iowa, 358, 17 N. W. 567, that our statute relating to taking the answers of a garnishee applied to a corporation, and that the end of the statute must be accomplished by taking the answer of the corporation, in writing, through some officer or agent authorized by the company to make it. Nor are most of the cases cited by counsel for appellant any nearer in point. It is provided in our statute (Code 1873, § 45) that "in the construction of the statutes the following rules shall be observed unless such construction would be inconsistent with the manifest intent of the general assembly or repugnant to the context of the statute * * *" "The word person may be extended to bodies corporate." *Id.* subd. 13. The policy of the law is to place corporations, so far as practicable, on the same footing, and subject to the

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same statutory provisions as apply to individuals. Cases are cited holding that, in order to maintain a bill of discovery against a corporation, one of its officers must be made a party defendant to the bill, in order that a discovery may be had from the natural person thus made a defendant. Also, cases in which corporations were defendants, and in which an application was made for an order for the examination of some officer of such corporation under statutes authorizing the examination of a party to the action, wherein the courts held that the statute limited the power to an order for an examination of "a party to the action," and the officers sought to be examined were not such parties. None of these cases appear to us applicable to the question before us. Here the statute imposes a duty on a party to the action, whether that party be a natural person or a corporation. That duty is to answer interrogatories attached to a pleading. The corporation could have attached interrogatories to its answer, and insisted on the plaintiff answering them. This right carries with it the reciprocal duty of responding in turn when interrogatories are propounded to it. Manifestly, the corporation, as such, cannot make answer. It can only act through its officers and agents. How, then, is the statutory duty to be discharged? Clearly, in the only way it can be done by the proper agent of the corporation making its answers. Whether he can personally be punished for contempt for failing to answer is not material to the determination of the question before us. In Missouri the court, speaking of a case where one party was a corporation, and an affidavit for change of venue was made by its secretary, said, after citing a number of cases holding that the affidavit must be made by a party, "But these cases cannot rule where the party making the application is a corporation, for in such cases the application must be made by an officer or agent from necessity." *Railway Co. v. Fowler*, 20 S. W. 1069. We think the action of the court in requiring the interrogatories to be answered was proper.

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4. It is urged that the interrogatories need not be answered because they were not annexed to the petition, and because they were immaterial to the issues, and because the affidavits attached to them were not made by the plaintiffs, but by their attorney. Some of the interrogatories were certainly material. It would be exceedingly technical to say that, because the statute requires the interrogatories to be annexed to the petition (Code, § 2693), therefore annexing them to an amended petition was not a compliance with the law. There is no merit in such a contention. As to the objection that the affidavit was not made by the plaintiff, but by his attorney, it is sufficient to say that it appears to have been first raised in this court, and hence cannot be considered.

Same—Amended
Petitions.Objections to Af-
fidavit—Appealed.

5. It is said that the interrogatories were fully answered. In the statement of the case, we set out the answers. The lower court rightfully struck them out. They showed on their face that no attempt had been made in good faith to answer the interrogatories fairly and candidly. The answers showed a studied attempt to avoid complying with the law, by entering a disclaimer on part of the answering officers as to any personal knowledge as to the matters inquired about. Counsel for appellant admit in argument (and the fact would be apparent if not admitted) that the information sought by the interrogatories was in the possession of the defendant corporation, was shown by its books and papers in the custody of its officers, and, for all that appears, easily and speedily accessible to the answering officers. Studiously avoiding all these sources of information, in their own possession as officers of the defendant, they answer that they have no personal knowledge as to the matters inquired about, and they know of no officer of the defendant having such personal knowledge. Under the circumstances, with the means of knowledge in their own possession, these answers presented a very clear case of trifling with the court. In Sloane

Answers to Inter-
rogatories.

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v. Railway Co. (Cal.) 44 Pac. 320, it is said in the syllabus, which is sustained by its decision, "A corporation cannot deny for want of sufficient information and belief, if the matters alleged are presumptively within the knowledge of any of its officers, though the officer verifying the answers is himself without any information or belief on the subject." The court was exceedingly lenient, and more than once extended the time of the defendants to answer the interrogatories. His action in striking these answers and the answers in the case was in all respects proper. Code, §§ 2699, 2700.

6. The court allowed interest on the treble damages claimed from the time the alleged cause of action accrued to the date of the judgment. We think this was error. This statute is penal in character,

Penal Statutes—
Liability—Inter-
est on Damages.

ter, and therefore liability should be limited to the amount fixed by the statute as compensation for the damages sustained, to wit, the treble damages, attorney's fees, and costs. The following decisions under other statutes are applicable: *Brentner v. Railroad Co.*, 68 Iowa, 530, 23 N. W. 245, and 27 N. W. 605; *Herriman v. Railroad Co.*, 57 Iowa, 187, 9 N. W. 378, and 10 N. W. 340. Plaintiffs, however, having filed in this court an offer to remit the excessive amount allowed, it is ordered that judgment in each case be reduced in the following amount: In *Blair v. These Defendants*, in the sum of \$86.75; in *Halloway v. These Defendants*, in the sum of \$481.74; in *Brown v. These Defendants*, in the sum of \$97.80; in *Macoy v. These Defendants*, in the sum of \$185.70. The death of A. B. Brown, a plaintiff, is suggested, and John R. Brown, his administrator, is substituted as a party plaintiff. The judgment of the court below, as thus modified, in each case, will stand affirmed, including the allowance therein made of attorney's fees, and said modified judgments will draw 6 per cent. interest from the date they were rendered in the district court. *Affirmed.*

DEEMER and LADD, JJ. We dissent from the con-

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clusions of the majority. As the legislature has cured our objections by a statute enacted since the trial of this case in the court below, a statement of the reasons for the dissent is not important.

NOTE. The opinion of the court was prepared by KINNE, C. J., substantially as it now appears, and, after his retirement from the bench, was adopted by the majority as the opinion of the court.

STATE (MOORE *et al.* Prosecutors.)

v.

COMMISSIONERS OF STREETS OF BOROUGH OF HADDONFIELD *et al.*

(*Supreme Court of New Jersey, Feb. 21, 1898.*)

Street Railways—Municipal Powers—Abutting Owners.—It is not necessary to the regulating of the use of streets in a borough, by a street railroad company already having, by ordinance passed conformably to the acts of 1893 and 1894 (3 Gen. St. pp. 3235, 3247), a location of tracks, and the right to construct, maintain, and operate its railroad, that there should be a new or continued consent of any abutting landowners, or a public hearing on notice. The general powers of boroughs (P. L. 1897, p. 296, § 28) suffice for that purpose, even though the railroad has not been fully constructed.

(Syllabus by the Court.)

ARGUED November term, 1897, before VAN SYCKEL, DIXON, and COLLINS, JJ. *Ordinance sustained.*

J. Fithian Tatem and *Herbert A. Drake*, for prosecutors.

Henry S. Scovel, for defendant borough of Haddonfield.

E. A. Armstrong and *D. J. Pancoast*, for defendant West Jersey Traction Co.

COLLINS, J. The West Jersey Traction Company, a corporation organized under the act of March 14, 1893 (3 Gen. St. p. 3235), procured from the governing body

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of the borough of Haddonfield, by ordinance passed March 6, 1895, and accepted by the company March 10, 1895, a location of its tracks, on the Haddonfield and Camden Turnpike, and on certain streets, including Main street, in said borough, and permission to construct, maintain, and operate a street railroad thereon. There was full compliance with said act of 1893, and with the act of 1894 (3 Gen. St. p. 3247). The consent of landowners presented as a basis for the ordinance named the said turnpike and the streets affected, was general in form, unlimited in scope, and extended to the location of tracks and the construction of the railroad with all lawful appliances. Section 1 of the ordinance contained the location and description of tracks, and the grant of permission to construct and operate. Section 2 made certain requirements, for a violation or refusal whereof the company should forfeit all rights under the ordinance, and fixed the period of consent at 25 years. It is admitted by a stipulation in the cause that said ordinance "was properly passed and accepted, and that thereunder railroad track was built on the turnpike in the borough of Haddonfield, approaching within a few feet of the Main street, and extending along the turnpike beyond the borough line, but that no track has been laid on the Main street in the borough of Haddonfield." On May 12, 1897, there was passed "A supplement to an ordinance regulating the railroad of the West Jersey Traction Company." It recites the ordinance of March 6, 1895, and that "certain regulations and limitations contained in the said ordinance are deemed impracticable, and it is believed to be best for the interest of this municipality and the said corporation in that respect only to make certain changes therein and thereof, and then proceeds to ordain that sections 1 and 2 of the ordinance be amended as therein follows: Sections are added requiring the work therein authorized to be commenced within three weeks, and to be finished within six months from such commencement, and repealing all ordinances and parts of ordinances inconsist-

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ent therewith to the extent of such inconsistency. The changes made by this supplement from the original ordinances are substantially as follows: In the first section (1) a derailing switch at the crossing of the Camden & Atlantic Railroad is dispensed with. (2) The gauge of the tracks is changed from five feet and two inches to five feet. This does not affect the location of the tracks, but only the distance between the inner surfaces of the tops of the rails projecting above their flanges. In the second section (3) macadam, faced with Belgian block, is substituted for rubblestone pavement, which, where already laid, is to be taken up, and relaid outside the macadam. (4) A time limit for finishing at least one line of track is omitted. (5) A requirement to run cars at specified minimum intervals is omitted. (6) The maximum rate of speed is changed from six to eight miles an hour; but this had already been done by a supplemental ordinance passed April 30, 1895. And (7) the limit of the period of the consent to 25 years is omitted.

The prosecutors attack the ordinance of May 12, 1897. The causes assigned for its reversal are that the consent of abutting land-owners above recited has spent its force, and cannot sustain a new ordinance; that, by reason of withdrawals there does not now subsist the consent of the owners of the necessary frontage; and that there was no public hearing upon a notice posted and published as required by said statutes. The supposed invalidity of the ordinance under review rests upon the erroneous assumption of its being a new grant. The original ordinance still stands, and no withdrawal of consent of the abutting owners can affect it. The consent upon which that ordinance was based was unlimited and unconditional. Where a grant is partial only, as permitted by the act of 1894, then, if the consent be withdrawn, power to extend the grant may be questionable; but, where the grant is complete, the right to construct cannot be made to depend upon the continuance of the consent. Modification or removal of restrictions do not involve a new grant, requiring

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the statutory consent. The restrictions concern the public, not the abutting owners. No public hearing on notice was required as a prerequisite to the changes ordained May 12, 1897. They come within the general municipal power of regulation. The restrictions imposed by the original ordinance either were within the general corporate powers of the borough, or else derived their efficacy from their acceptance by the traction company, as conditions of its grant. It would be absurd to say that no restriction can be imposed on or removed from a street-railway company without a public hearing on notice. It is not necessary to give notice even to the owners of land on the street, unless their private property rights are to be affected. *Kennelly v. Jersey City*, 57 N. J. Law, 293, 30 Atl. 531. The general borough act, approved April 24, 1897 (P. L. p. 296, § 28), authorizes ordinances to prescribe the manner in which corporations or individuals shall exercise any privilege granted to them in the use of any street, road, or highway, to regulate the use of the streets of the borough by street railway companies, etc. The supplemental ordinance is within this authority and seems to have been regularly passed. It is affirmed, with costs.

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COLONIAL CITY TRACTION CO.

v.

KINGSTON CITY R. CO. *et al.*

(*Court of Appeals of New York, Oct. 5, 1897.*)

Street Railroads—Condemnation of the Tracks of One Company to the Use of Another Company.—Section 102 of the "Railroad Law" of New York provides for the condemnation of the tracks of one street surface railroad company to the use of another for a distance not exceeding one thousand feet; and section 91 of the same law, containing, in substance, the same declaration as the one embodied in section 18 Article 3 of the Constitution of New York, declares that no street surface railroad shall be built, extended or operated unless the consent in writing of the owners of one-half in value of the property bounding on said contemplated road shall have been first obtained. *Held*, that both the condemnation under section 102, and the consent of property owners required by section 91, were conditions precedent to a company's right to, practically, extend its tracks by using those of another company.

APPEAL from appellate division supreme court.
Third department. *Affirmed.*

G. D. B. Hasbrouck, for appellant.

A. T. Clearwater, for respondents.

VANN, J. The appellant is a street-railroad company, organized April 22, 1896, owning and operating a surface railroad in the city of Kingston, running substantially east and west across the city, but in two sections, each about two miles long, and separated near the middle of the town by a portion of the street known as "Broadway." The eastern section ends at the central line of Prince street, where it crosses Broadway, and the western section at the central line of Cedar street, where it crosses Broadway, the distance between the two points, as measured on the street last named, being 870 feet. The respondent is also a street-railroad company, organized June 7, 1879, operating a surface railroad in said city upon tracks laid in various

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streets, and, among others, through Broadway, from the central line of Prince street to the central line of Cedar street. Both railroads are operated by electricity. The appellant, by extending its tracks through Broadway, from Prince street on the east to Cedar street on the west, could connect its eastern and western sections, and thereby save itself the expense, and the public the inconvenience, of transferring passengers by omnibus from one part of its road to the other. The local authorities, up to the time of the trial, had refused to permit the appellant to extend or operate its road through the short strip of Broadway above mentioned, and thus unite the two sections, and the respondent had likewise refused to permit the use of its track over said strip for the same purpose. No effort has been made by the appellant, so far as appears, to obtain the consent of the property owners whose lands abut upon Broadway between Prince and Cedar streets to such extension of its road, or to the operation thereof when extended. This proceeding was instituted by the appellant to acquire by condemnation, under the statute, the right to use the respondent's tracks over the strip in question, upon making proper compensation therefor. The application was resisted, an answer served, and a trial had, which resulted in an adjudication that the proposed use of the respondent's railroad, including "poles, wires, and appurtenances," was actually necessary, within the meaning of the statute, and commissioners were appointed "to determine the extent and the manner in which" the appellant should "have the right to take, hold, and use the said track, poles, wires, incidents, and appurtenances," and to "ascertain and determine the amount of the compensation to be made" for the same. An appeal was taken to the appellate division, which reversed the judgment, and dismissed the proceeding, two of the learned justices dissenting. 15 App. Div. 195, 44 N. Y. Supp. 732. A further appeal has brought the matter before us for determination.

The proceeding was commenced in March, 1896, and

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was founded upon section 102 of the "Railroad Law," which provides, so far as now material, that "no street surface railroad corporation shall construct, extend or operate its road or tracks in that portion of any street * * * in which a street surface railroad is * * * constructed, * * * without first obtaining the consent of the corporation owning and maintaining the same, except that any street surface railroad company may use the tracks of another street surface railroad company for a distance not exceeding one thousand feet, * * * whenever the court upon an application for commissioners shall be satisfied that such use is actually necessary to connect main portions of a line to be constructed or operated as an independent railroad, * * * and that the public convenience requires the same, in which event the right to use shall only be given for a compensation to an extent and in a manner to be ascertained and determined by commissioners to be appointed by the courts as is provided in the condemnation law." Laws 1890, c. 565, § 102, as amended by Laws 1892, c. 676; Laws 1893, c. 434; and Laws 1894, c. 693. The respondent, in opposing the effort to condemn the right to use a part of its track and appurtenances, relies upon section 18 of article 3 of the constitution, which provides, among other things, that "no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the appellate division of the supreme court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the

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property owners." Const. 1894. art. 3, § 18; Const. 1846, art. 3, § 18, as amended in 1874. Reliance is also placed upon section 91 of the railroad law, which provides, in substance, that "a street surface railroad, or extensions, or branches thereof, shall not be built, extended or operated unless the consent in writing, * * * of the owners * * * of one-half in value * * * of the property bounded on, and also the consent of the local authorities having control of that portion of a street or highway upon which it is proposed to build or operate such railroad shall have been first obtained." Laws 1890, c. 565, § 91, as amended by Laws 1892, c. 676; Laws 1893, c. 434; Laws 1894, c. 723; Laws 1895, c. 545.

If the consent of the local authorities or of the abutting owners is required to enable the appellant to extend or operate its road through Broadway, under the circumstances, this proceeding cannot be maintained until the requisite consent has been obtained. If it is required at all, it must be had before the proceeding is begun, for the statute, in providing that the consent "shall have been first obtained," makes it a condition precedent. As said by this court, when construing a similar statute under somewhat similar circumstances: "Sufficient vitality and strength to go on with and construct a railroad do not exist * * * until infused by the consents of the local authorities and property owners." *In re Rochester Electric Ry. Co.*, 123 N. Y. 351, 358, 25 N. E. 381. It is, however, insisted that the appellant does not seek to build a railroad through Broadway, but to acquire the right to use a road already built, after consent had been duly obtained from all sources required. It is true that the appellant does not intend to build a railroad through Broadway, in the sense of laying a track there, but it does intend to "extend and operate" its railroad by so using the tracks of the respondent as to unite the two sections of its own road. Tracks alone do not constitute a railroad, within the meaning of a statute which declares that a railroad shall not be "built, extended or operated"

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until certain preliminaries have been complied with. Cars and other appliances are required in order to make or operate a railroad. If the appellant shall finally succeed in acquiring the right to run its cars for a short distance on the respondent's tracks, it will still be operating its own railroad, not that of another company, over that part of its route, as well as any other. It clearly would not be operating the respondent's railroad, but using a portion of the tracks of the respondent to operate its own railroad. Two different companies cannot operate the same railroad at the same time, although both may use the same track in part to operate their respective roads. When the statute provides that "any street surface railroad company may use the tracks of another street surface railroad company" upon certain conditions, permission to "use the tracks" implies use for the purpose of operating its cars thereon. Manifestly, no other use is intended. A railroad is none the less in operation between two points because it runs its cars for a part of the way over the tracks of another road. When a railroad corporation acquires the right to run its cars over a street, whether upon its own track or that of another, that right becomes a part of the railroad, and, in exercising that right, the corporation operates its own road. The operation of a railroad includes the running of cars, and when a company runs its own cars, receives its own passengers, and collects its own fares over a continuous route, of four miles, and all the trackage belongs to it except a connecting link of a few hundred feet in the middle, which it acquires the right to use through the power of eminent domain, we think it is to be regarded as operating its own railroad over the entire route, within the meaning of the constitution and the statute. The prohibition is in the disjunctive, and is directed against operation the same as it is against construction.

It is further insisted that, where one company has the consent of both local authorities and abutting owners to build and operate a railroad through a street, no further consent from either of those sources is

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necessary to enable a second company to use the tracks of the first, and hence that neither the constitution nor statute applies to the case in hand. The consent required is not simply to the laying of the tracks, but also to the operation of the road. When the municipal authorities consented that the respondent might operate its road through Broadway, they did not consent that another company might operate a distinct and independent line through that street. The operation of one railroad might cause so slight an interference with the use of the street as not to seriously impair its usefulness, whereas, if two or more railroads were permitted to operate their lines through the street, it might virtually destroy it for the ordinary purposes of a highway. The danger of crossing at grade steam surface railroads, of which there are two running across the strip in question, would be greatly increased by the traffic of several street railroads, which shows the necessity of keeping the subject thoroughly under the control of the public authorities by conservative legislation and conservative construction of that legislation. So, an abutting owner might be willing to permit one company to operate its line through the street in front of his property, which would involve the passage of but three or four cars an hour, but not be willing that several companies should have that privilege, which might involve the passage of a car every two minutes. It is not the laying of tracks, but the running of cars that constitutes the chief burden both upon the street and the property of the abutting owners. Consent to the burden of one road should, in reason, be limited to that road with whatever increase of business it may have, but should not be extended to as many roads as can crowd their cars into operation upon the street. It would be an unreasonable construction to hold that this is what the public authorities or the private citizens intend when they consent to the building and operation of a street railroad. Instead of an advantage to the public, or to those owning property on the street, which is the inducement to obtain consent, it might

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result in a heavy and unexpected burden upon both, without any power to prevent it, and yet with no intention to consent to it. It would be a perversion of the consent given by extending it far beyond the intention of the parties. The object of the statute is to protect the public against injury to the streets, without the consent of their representatives, and also to protect the property of the citizen against injury without his personal consent or the consent of a majority of the abutting owners, or, where the refusal to consent is unreasonable, the order of the appellate division of the supreme court. The consent thus required is of such importance as to be embedded in the constitution itself, not in the interest of railroad corporations, but of public and private rights. The statute, however, goes a step further than the constitution, by providing, through section 102 of the railroad law, additional protection to the public, by prohibiting a second company from laying a track in a street already occupied by the track of another company, and thus incidentally protecting the latter from competition on the same street without compensation. Sections 91 and 102 relate to the same general subject, and should be construed together. The latter does not provide an alternative right, but is an additional requirement to regulate the construction and operation of street railroads, so that the public interests may be promoted and private rights protected. *In re Thirty-Fourth St. R. Co.*, 102 N. Y. 343, 7 N. E. 172. Construed as an alternative provision, it would be in violation of the constitution, for it would authorize the operation, if not the construction, of a street railroad, without the consent required by that instrument. Even if the old road should consent under section 102, the new road could neither extend nor operate without the consent required by section 91.

We agree with the reasoning of the learned appellate division in this case, and should have adopted their opinion as our own had it not been silent upon the question as to the necessity of consent on the part of

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property owners. In order to avert further litigation in this as well as in other cases that may arise, we have deemed it our duty to express our views upon that subject also. We think that, when consent is given either in behalf of the public or the abutting owners to one company, it is for its own use, and not for the use of an indefinite number of other companies, regardless of the interests of the city or of the owners of property on the street. The order appealed from should be affirmed, with costs. All concur, except GRAY, J., absent. Order affirmed.

NEWBERGER COTTON CO.

v.

ILLINOIS CENT. R. CO.

(Supreme Court of Mississippi, Feb. 14, 1898.)

Carriers of Freight—Loss by Fire—Contract for Exemption from Liability—Negligence—Burden of Proof.*—In an action against a carrier to recover the value of cotton lost by fire, the burden is on the carrier to show that the fire was not due to its negligence in any degree, however slight, although the contract of shipment exempts it from liability for loss by fire.

APPEAL by plaintiff from Holmes county circuit court. *Reversed.*

Action by shipper of cotton to recover its value from the carrier. The declaration sought to charge defendant with common law liability as an absolute insurer, the cotton having been destroyed by fire.

Noel & Pepper, for appellant.
Mayes & Harris and *McClurg & Flowers*, for appellee.

WHITFIELD, J. It is competent for a railroad company to contract with a shipper restricting its common-law liability as an absolute insurer, and exempting itself

*See note at end of case.

Note

from liability for a fire accidental, and, as to the action of its employees, nonnegligent. But such contract must be "deliberately and fairly assented to" by the shipper, and, though so made, the carrier is still liable unless it meets the burden on it of showing that the fire was not due to its negligence in any degree, however slight; since it is against public policy as to public carriers to permit contracts against any negligence on their part. It is immaterial that the amended declaration sought to charge the appellee with common-law liability as an absolute insurer. Under such a declaration, failure of proof to negative negligence on appellee's part leaves it liable, because in such case, though the plaintiff may not show liability as an insurer, he does the lesser liability for negligence, embraced in the greater absolute liability as an absolute insurer. The greater includes the lesser. He alleges a greater liability than he proves, but he does prove a liability, when the carrier fails to meet the burden of showing loss from the excepted cause by negating loss from its negligence, less than, but embraced in, that alleged. This is the clear result of our decisions. *Railroad Co. v. Weiner*, 49 Miss. 725; *Railroad Co. v. Faler*, 58 Miss. 911; *Railroad Co. v. Moss*, 60 Miss. 1011; *Express Co. v. Moon*, 39 Miss. 822. The solution of this case is thus—conceding the special contract to be void, as to which we say nothing now—resolved into the single question whether there was evidence that there was negligence on the part of appellee as to the origin of the fire, or in extinguishing it, which required the submission of the case to the jury, and we think there clearly was such evidence. Reversed, verdict set aside, and remanded.

NOTE.

Carriers of Freight—Contract for Exemption from Liability—Negligence—Burden of Proof.—A common carrier is bound to make safe delivery of all goods intrusted to its carriage, unless loss by the act of God or the public enemy, but he may exempt himself by special contract, except for negligence. And the burden of proof is

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on the carrier to show a loss from an excepted cause. *Wallingford v. Columbia & G. R. Co.*, 30 Am. & Eng. R. Cas. 40, 26 So. Car. 258, 2 S. E. Rep. 19; *Baltimore & O. R. Co. v. Brady*, 32 Md. 333; *Shriver v. Sioux City & St. P. R. Co.*, 24 Minn. 506; *Davidson v. Graham*, 2 Ohio St. 131; *Graham v. Davis*, 4 Ohio St. 362; *Whitesides v. Russell*, 8 Watts & S. (Pa.) 44; *Hull v. Chicago, St. P., M. & O. R. Co.*, 40 Am. & Eng. R. Cas. 104, 41 Minn. 510, 5 L. R. A. 587, 43 N. W. Rep. 391.

The burden is on him, not only to establish the special agreement limiting such liability, but also to show that the loss falls within the terms of such agreement, and that it was occasioned without fault or neglect on his part. *Gaines v. Union T. & I. Co.*, 28 Ohio St. 418, 14 Am. Ry. Rep. 158; *Union Exp. Co. v. Graham*, 26 Ohio St. 595; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Southern Exp. Co. v. Moon*, 39 Miss. 822.

If a carrier claims that goods were shipped under a special contract, excepting other risks and perils than those excepted at common law, it is for him to establish the contract and show that the risk or loss was excepted by such contract. *Witting v. St. Louis & S. F. R. Co.*, 28 Mo. App. 103.

Where a common carrier limits his liability by special contract, the onus is on him of showing not only that the cause of the loss is within the terms of the exception, but also that there was no negligence. *Baker v. Brinson*, 9 Rich. (So. Car.) 201; *Shriver v. Sioux City & St. P. R. Co.*, 24 Minn. 506.

A common carrier relying on an exemption from liability for loss by fire of goods delivered to it for carriage must show that the goods were destroyed by fire and that such loss was without fault on its part; and where the proof shows that the goods were delivered to the carrier, 16 and 40 hours before their destruction, and fails to show that it could not have forwarded them before the fire, the plaintiff is entitled to recover. *Louisville & N. R. Co. v. Touart*, 97 Ala. 514, 11 So. Rep. 756.

Where by special contract the liability of a common carrier of goods is limited to loss or injury through his negligence, the carrier must, to excuse himself, after loss or injury is proved, show that it occurred from some cause other than his negligence. He must show there was no negligence on his part. *Hull v. Chicago, St. P., M. & O. R. Co.*, 40 Am. & Eng. R. Cas. 104, 41 Minn. 510, 5 L. R. A. 587, 43 N. W. Rep. 391; *Ketchum v. American Merchants' Union Exp. Co.*, 52 Mo. 390; *Drew v. Red Line Transit Co.*, 3 Mo. App. 495.

The duty of the carrier to prove the absence of negligence on his part arises from the terms of the contract, from the character of his occupation, and from the rule of evidence requiring the facts to be proven by that party in whose knowledge they peculiarly lie. *Chicago, St. L. & N. O. R. Co. v. Moss*, 21 Am. & Eng. R. Cas. 98, 60 Miss. 1003.

Although the contract of affreightment contains a clause relieving the carrier from loss by fire, he is not thereby exempted from the use of proper care for the safety of the goods while in his possession to be forwarded. It is his duty to keep them, while in his hands awaiting reshipment, in a safe and proper place; and the burden of proof is on him to show that he has done so, although the fire originated, without his fault, in adjacent property over which

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he had no control, and although he made all reasonable efforts after it originated to prevent it from extending to the goods destroyed. *Erie R. Co. v. Lockwood*, 28 Ohio St. 358, 14 Am. Ry. Rep. 143.

Fire cannot be considered, in itself, an unavoidable danger; and in case of loss from that cause, the defendant is bound to show the origin or cause of the fire, to bring himself within the exception; otherwise the presumption is, it might have been avoided by proper care. *Union Mut. Ins. Co. v. Indianapolis & C. R. Co.*, 1 Disney (Ohio) 480.

When Plaintiff Must Affirmatively Show Negligence on Part of Carrier.—When, by contract, a common carrier is exempted from liability for loss occurring by fire, the owner of goods lost by fire in the transit must affirmatively prove that the loss was the result of negligence of the carrier or his agents, before he can recover. *Little Rock, M. R. & T. R. Co. v. Corcoran*, 18 Am. & Eng. R. Cas. 602, 40 Ark. 375. *Little Rock, M. R. & T. R. Co. v. Talbot*, 18 Am. & Eng. R. Cas. 598, 39 Ark. 523. *Little Rock, M. R. & T. R. Co. v. Corcoran*, 18 Am. & Eng. R. Cas. 602, 40 Ark. 375; *Witting v. St. Louis & S. F. R. Co.*, 101 Mo. 638; *Sager v. Portsmouth, S. & P. & E. R. Co.*, 31 Me. 228. *Witting v. St. Louis & S. F. R. Co.*, 28 Mo. App. 103.

Where a common carrier is sued for the loss of goods, it is sufficient for plaintiff in the first instance to prove a delivery to the carrier and a loss. If the carrier then sets up a special contract, limiting its liability, the burden is on it to prove that the loss occurred through causes from which it was relieved by the contract; but the carrier is not required to prove affirmatively that it was not guilty of negligence. Proof of negligence must come from the plaintiff; but it is sufficient to show negligence to prove that the loss would not have occurred by the exercise of reasonable skill and care. *Read v. St. Louis K. C. & N. R. Co.*, 60 Mo. 199, 9 Am. Ry. Rep. 201; *Mitchell v. United States Exp. Co.*, 46 Iowa 214; *Witting v. St. Louis & S. F. R. Co.*, 45 Am. & Eng. R. Cas. 369, 101 Mo. 631, 14 S. W. Rep. 743; *Lamb v. Camden & A. R. & T. Co.*, 46 N. Y. 271; *Whitworth v. Erie R. Co.*, 87 N. Y. 413; *Farnham v. Camden & A. R. Co.*, 55 Pa. St. 53; *Patterson v. Clyde*, 67 Pa. St. 500; *Little Rock, M. R. & T. R. Co. v. Talbot*, 39 Ark. 526; *Memphis & C. R. Co. v. Reeves*, 10 Wall. (U. S.) 176. *Hance v. Pacific Exp. Co.*, 48 Mo. App. 179. *Heil v. St. Louis, I. M. & S. R. Co.*, 16 Mo. App. 363. *Texas & P. R. Co. v. Morse*, 1 Tex. App. (Civ. Cas.) 179.

Showing Case Within Exception Sufficient, Without Proving Absence of Negligence.—After the loss has been shown by the carrier to have been within the clause of the special contract exempting the carrier from liability, according to the rule in a large number of jurisdictions, the carrier is not bound to go further and prove an absence of negligence on its part, but the burden of proof is on the shipper to defeat the effect of the clause by affirmative proof of the carrier's negligence.

England.—*Harris v. Packwood*, 3 Taunt. 264. See *Marsh v. Horne*, 5 B. & C. 322, 11 E. C. L. 243.

United States.—*The Jefferson*, 31 Fed. Rep. 489; *Wertheimer v. Pennsylvania R. Co.*, 17 Blatchf. (U. S.) 421; *Van Schaack v. Northern Transp. Co.*, 3 Biss. (U. S.) 394; *Western Transp. Co. v. Downer*, 11 Wall. (U. S.) 133; *The New Orleans*, 26 Fed. Rep. 44;

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Speyer v. The Mary Belle Roberts, 2 Sawy. (U. S.) 1; *Clark v. Barnwell*, 12 How. (U. S.) 272.

Arkansas.—*Little Rock, etc., R. Co. v. Corcoran*, 40 Ark. 375, 18 Am. & Eng. R. Cas. 602; *Little Rock, etc., R. Co. v. Harper*, 44 Ark. 208, 21 Am. & Eng. R. Cas. 97; *Little Rock, etc., R. Co. v. Talbot*, 39 Ark. 523, 18 Am. & Eng. R. Cas. 598.

Iowa.—*Mitchell v. U. S. Express Co.*, 46 Iowa 214.

Kansas.—*Kallman v. U. S. Express Co.*, 3 Kan. 205; *Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 623.

Louisiana.—*Kelham v. Steamship Kensington*, 24 La. Ann. 100; *Kirk v. Folsom*, 23 La. Ann. 584; *New Orleans Mut. Ins. Co. v. New Orleans, etc., R. Co.*, 20 La. Ann. 302; *Price v. The Uriel*, 10 La. Ann. 413.

Maine.—*Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228, 50 Am. Dec. 659.

Maryland.—*Bankard v. Baltimore, etc., R. Co.*, 34 Md. 197, 6 Am. Rep. 321.

Missouri.—*Read v. St. Louis, etc., R. Co.*, 60 Mo. 199, 9 Am. Ry. Rep. 201; *Harvey v. Terre Haute, etc., R. Co.*, 6 Mo. App. 585, 74 Mo. 538; *Otis Co. v. Missouri Pac. R. Co.*, 112 Mo. 622; *Witting v. St. Louis, etc., R. Co.*, 28 Mo. App. 103, 101 Mo. 631, 20 Am. St. Rep. 636, 45 Am. & Eng. R. Cas. 369; *Heil v. St. Louis, etc., R. Co.*, 16 Mo. App. 363; *Hance v. Pacific Express Co.*, 48 Mo. App. 179.

New York.—*Lamb v. Camden, etc., R., etc., Co.*, 46 N. Y. 271, 7 Am. Rep. 327, *reversing* 2 Daly (N. Y.) 454; *Whitworth v. Erie R. Co.*, 87 N. Y. 413; *French v. Buffalo, etc., R. Co.*, 4 Keyes (N. Y.) 108; *Canfield v. Baltimore, etc., R. Co.*, 93 N. Y. 532, 45 Am. Rep. 268; *Sutro v. Fargo*, 41 N. Y. Super. Ct. 231; *Cochran v. Dinsmore*, 49 N. Y. 249.

North Carolina.—*Smith v. North Carolina R. Co.*, 64 N. Car. 235.

Pennsylvania.—*Colton v. Cleveland, etc., R. Co.*, 67 Pa. St. 211, 5 Am. Rep. 424; *Buck v. Pennsylvania R. Co.*, 150 Pa. St. 170, 30 Am. St. Rep. 800; *Pennsylvania R. Co. v. Raiordon*, 119 Pa. St. 577, 4 Am. St. Rep. 670.

Tennessee.—*Louisville, etc., R. Co. v. Manchester Mills*, 88 Tenn. 656.

Where there is proof of the fact of the injury and of the manner of its occurrence under circumstances which do not import negligence on the part of the carrier, there is no liability on the carrier, where it has contracted for a limited liability only, except upon affirmative proof of its negligence as an inducing cause of the injury; and the burden of making such proof is on the plaintiff. *Buck v. Pennsylvania R. Co.*, 150 Pa. St. 170, 30 Am. St. Rep. 800.

Goods which were carried under a bill of lading limiting the carrier's liability were carried to the place of their destination and put in a shed on the carrier's wharf, where four watchmen were employed. While they were there, a fire, starting from an unknown cause, broke out in a steamboat lying near the wharf, while the boat was fully manned, and destroyed the goods in the shed. It was held that this proof adduced by the carrier was sufficient, *prima facie*, to relieve it from liability and to cast on the plaintiff the burden of proving negligence. *Farnham v. Camden, etc., R. Co.*, 55 Pa. St. 53.

Negligence as a Proximate Cause Must be Proven.—The complainant must establish not only a want of care on the part of the

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carrier, but must show that such want of care was the proximate cause of the loss. *Childs v. Little Miami R. Co.*, 1 Cinc. Super. Ct. Rep. 480.

Negligence Not to be Inferred—Losses by Fire.—Where the special contract exempts the carrier from liability for losses by fire, negligence on the part of the carrier cannot be inferred from the mere fact that the fire occurred while the goods were in the carrier's possession in transit; it must be proven affirmatively by the party asserting it. *Indianapolis, etc., R. Co. v. Forsythe*, 4 Ind. App. 326; *Smith v. North Carolina R. Co.*, 64 N. Car. 235. In this latter case the rule was applied although it appeared that the company had no spark arresters on its engines, and the plaintiff's cotton was burned while being carried by it.

TALLASSEE FALLS MFG. CO.

v.

WESTERN RY. OF ALABAMA.

(*Supreme Court of Alabama, Feb. 11, 1898.*)

Action for Value of Goods—Complaint—Actions Ex Contractu—Ex Delicto.—A count of the declaration in an action to recover the value of goods destroyed through the alleged negligence of a common carrier, which alleges both a consideration and a promise, is one *ex contractu* and not *ex delicto*.

Same.—A count declaring on the contract itself cannot be joined with one in *assumpsit*.

Bills of Lading—Admissibility of Parole Testimony*—In such action the bill of lading is to be taken as the sole evidence of the final agreement of the parties, and parole evidence is inadmissible to vary its terms or legal import.

APPEAL by plaintiff from Montgomery county circuit court. *Affirmed.*

Tompkins & Tray, for appellant.

George P. Harrison, for appellee.

HARALSON, J. 1. The first count in the complaint follows form 15, p. 793, of the Code of 1886, for a suit "on a bill of lading of a common carrier."

Hutchinson, in his work on Carriers (section 744), referring to the character of this action, states, Case Stated.

*See note at end of case.

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that in former times it was a very perplexing question how the form of the action,—whether in case or assumpsit,—should be distinguished, and adds, that it seems “to be finally settled, that while the allegation of a promise in the declaration will not be sufficient to impress upon it the destructive feature of a declaration upon the contract, because of the words ‘agreed’, ‘undertook’, or even the more significant word ‘promised’, must be treated as no more than inducement to the duty imposed by the common law, yet if there be an averment of a promise and a consideration, the declaration must be construed to be upon the contract, and not for the breach of duty.” The

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count under consideration alleges both a consideration and a promise. In keeping with the principles thus announced, we have held, more than once, and latterly, that this form of action is one ex contractu and not ex delicto, and to such conclusion we adhere. *Holland v. Express Co.* (Ala.) 21 South. 992; *McDaniel v. Johnson*, 110 Ala. 526, 19 South. 35; *McCarthy v. Railroad Co.*, 102 Ala. 193, 14 South. 370; *Railroad Co. v. Eichofer*, 100 Ala. 227, 14 South. 56.

2. The second count declares on the contract itself, and cannot be pretended to be in case. *Same.* Such a count could not be joined with one in assumpsit. 3 Brick. Dig. p. 704, § 57.

3. Where one sues a common carrier by reason of the default of the latter, whereby an injury or loss has happened to him, whether the action be based on a breach of duty or upon the contract, it is “necessary for the plaintiff to show a delivery of the goods to him, an undertaking or contract on his part, either express or implied, to transport them as alleged, and a failure to perform the contract or his duty according to his understanding.” *Hutch. Carr.* § 795. Again, the same author says, “The contract with the carrier may be expressed or implied. If it be express, it should be proven, whether the action be in tort or assumpsit,” etc. Section 762.

Note

Mr. Greenleaf on the same subject says, "Oral proof cannot be substituted for the written evidence of any contract, which the parties have put in writing. Here, the written instrument may be regarded, in some measure, as the ultimate fact to be proved, especially in negotiable securities; and in all cases of written contracts, the writing is tacitly agreed upon, by the parties themselves, as the only repository and appropriate evidence of their agreement. The written contract is not collateral, but is of the very essence of the transaction." 1 Greenl. Ev. § 87.

In the transportation of freight [as this court has said in *Railroad Co. v. Fulgham*, 91 Ala. 556, 8 South. 803], the bill of lading embodies the contract between the shipper and the carrier, and when delivered by the carrier and received by the shipper, its terms, stipulations and conditions are as binding on the parties thereto, as are the terms, stipulations and conditions of any other written contract. A bill of lading is, therefore, to be taken as the sole evidence of the final agreement of the parties, by which their duties and liabilities must be regulated, and parol evidence is inadmissible to vary its terms or legal import."

Bills of Lading—
Admissibility of
Parole Evidence.

It is manifest from what has been said, that the lower court did not err in excluding the evidence offered by the plaintiff.

Affirmed.

NOTE.

Bills of Lading—Admissibility of Parole Testimony.—A bill of lading, as a contract expressing the terms and conditions upon which the property is to be transported, is to be regarded as the sole evidence of the final agreement between the parties, and in the absence of fraud or mistake, its terms or legal effect, when free from ambiguity, cannot be explained, added to or contradicted by parole testimony.

England.—*Goodrich v. Norris*, Abb. Adm. 196; *Bradley v. Dunipace*, 1 H. & C. 521; *Butler v. The Steamboat Arrow*, 1 Newb. Adm. 59.

United States.—*The Delaware*, 14 Wall. (U. S.) 579; *O'Rourke v. Two Hundred and Twenty-one Tons of Coal*, 1 Fed. Rep. 619.

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Alabama.—Wayland *v.* Mosley, 5 Ala. 430, 39 Am. Dec. 335; Cox *v.* Peterson, 30 Ala. 608, 68 Am. Dec. 145; Louisville, etc., R. Co. *v.* Fulgham, 91 Ala. 555.

Connecticut.—Barber *v.* Brace, 3 Conn. 14, 8 Am. Dec. 149.

Georgia.—Richmond, etc., R. Co. *v.* Shomo, 90 Ga. 496, *citing* 2 Am. & Eng. Encyc. of Law (1st ed.), p. 228.

Indiana.—Indianapolis, etc., R. Co. *v.* Remmy, 13 Ind. 518; Louisville, etc., R. Co. *v.* Wilson, 119 Ind. 352, 40 Am. & Eng. R. Cas. 85.

Iowa.—Wilde *v.* Merchants' Despatch Transp. Co., 47 Iowa 272.

Kansas.—Hopkins *v.* St. Louis, etc., R. Co., 16 Am. & Eng. R. Cas. 126.

Massachusetts.—Blanchard *v.* Page, 8 Gray (Mass.) 281.

Minnesota.—Minneapolis, etc., R. Co. *v.* Home Ins. Co., 55 Minn. 236.

Missouri.—O'Bryan *v.* Kinney, 74 Mo. 125; St. Louis, etc., R. Co. *v.* Cleary, 77 Mo. 634, 46 Am. Rep. 13; Turner *v.* St. Louis, etc., R. Co., 20 Mo. App. 632.

New York.—Niles *v.* Culver, 8 Barb. (N. Y.) 205; Fitzhugh *v.* Wiman, 9 N. Y. 559; Creery *v.* Holly, 14 Wend. (N. Y.) 26; White *v.* Van Kirk, 25 Barb. (N. Y.) 16; Long *v.* New York Cent. R. Co., 50 N. Y. 76; Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224; Germania F. Ins. Co. *v.* Memphis, etc., R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Hill *v.* Syracuse, etc., R. Co., 73 N. Y. 351, 29 Am. Rep. 163; Hinckley *v.* New York Cent., etc., R. Co., 56 N. Y. 429; Van Etten *v.* Newton, 134 N. Y. 143.

Ohio.—Lawrence *v.* M'Gregor, Wright (Ohio) 193; Wayne *v.* Steamboat General Pike, 16 Ohio 421; Cincinnati, etc., R. Co. *v.* Pontius, 19 Ohio St. 221, 2 Am. Rep. 391.

Pennsylvania.—Shaw *v.* Merchants' Nat. Bank, 8 W. N. C. (Pa.) 221; Hostetter *v.* Baltimore, etc., R. Co. (Pa. 1887), 11 Atl. Rep. 609.

Rhode Island.—Gardner *v.* Chace, 2 R. I. 112.

Texas.—Arnold *v.* Jones, 26 Tex. 335, 82 Am. Dec. 617.

The production of the bill of lading is an admission that the contract was in writing, and upon failure to prove the written contract, evidence of a parole contract is inadmissible. Peck *v.* Dinsmore, 4 Port. (Ala.) 212.

In an action by the consignee for the loss of goods shipped under a bill of lading, it was held that the carrier could not give in evidence representations, made by the consignor before the execution of the bill, as to the depth of the water at the place of landing, where there was no evidence that the representations were fraudulently made. Shaw *v.* Gardner, 12 Gray (Mass.) 488.

Evidence of authority to sign for the master is, however, admissible notwithstanding the rule. Putnam *v.* Tillotson, 13 Met. (Mass.) 517.

Savannah, F. & W. Ry. Co. v. Austin

SAVANNAH, F. & W. RY. CO.

v.

AUSTIN.

(*Supreme Court of Georgia, July 8, 1897.*)

Damage to Goods—Negligence of Connecting Carrier—Notice to Contracting Carrier—Right of Recovery.—Where, in order to avail himself of the right of action afforded by section 2317 *et seq.* of the Civil Code, the shipper of goods over connecting lines of railway merely gives notice to the initial carrier that the goods shipped have not been delivered to the consignee in accordance with the contract of affreightment, claiming that such goods had never arrived at destination and thereupon demands that such carrier shall trace the goods and “show delivery,” he cannot, upon the failure of such carrier to comply with this demand, recover of it, by virtue of the provisions of these sections, for injury done to the goods in the course of their transportation by the negligence of an intermediate carrier, if it appear that the goods were in fact delivered to the consignee prior to the service of such notice.

(Syllabus by the Court.)

ERROR by defendant from Brooks county superior court. *Reversed.*

Erwin, DuBignon & Chisholm, and E. P. S. Denmark, for plaintiff in error.

M. Baum, for defendants in error.

SIMMONS, C. J. This suit was brought under section 2317 *et. seq.* of the Civil Code, wherein it is provided that, “when any freight that has been shipped, to be conveyed by two or more common carriers to its destination, where under the contract of shipment or by law, the responsibility of each or either shall cease upon delivery to the next ‘in good order,’ has been lost, damaged or destroyed, it shall be the duty of the initial or any connecting carrier, upon application by the shipper, consignee or their assigns, within thirty days after application, to trace said freight and inform

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said applicant, in writing, when, where, how and by which carrier said freight was lost, damaged or destroyed, and the names of the parties and their official position, if any, by whom the truth of facts set out in said information can be established." "If the carrier to which application is made shall fail to trace said freight and give said information, in writing, within the time prescribed, then said carrier shall be liable for the value of the freight lost, damaged or destroyed, in the same manner and to the same extent, as if said loss, damage or destruction, occurred on its line." The record shows that by the contract of shipment the responsibility of each carrier was to "cease upon delivery to the next 'in good order,'" and that the goods were damaged in an admitted amount by the fault of one of the carriers other than the defendant. The notice or application was to "trace and show delivery," and further adds, "Consignee claims this car never arrived," and to it no response was ever made by the railway company.

This application, and the company's failure to comply therewith, were not, in our opinion, sufficient to entitle the applicants to recover of the company, by virtue of the provisions of the Code sections under which this action was brought, for injury done to the goods in the course of their transportation by the negligence of an intermediate carrier; it appearing that the goods were in fact delivered to the consignee prior to the service of the notice. The shippers had, under their contract, no right of action against the initial carrier for damage to the goods occurring on the line, and by reason of the negligence of an intermediate carrier, except such as they may have derived from sections 2317 *et seq.* of the Civil Code; and in order to avail themselves of the rights therein granted it was necessary that they should comply with certain conditions. While by these sections it is made the duty of the railway company, "upon application," to trace freight, and give information as to its loss, damage, or destruction, we think that this duty is restricted and controlled by the nature of the

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application. It is not intended that an application to trace freight as lost shall bind the company to give information as to its damage. Had the freight concerned in this litigation been lost, the notice given would have been sufficient to impose upon the company the duty of it, and giving the information desired, and a failure to do so would have entitled the applicants to bring this action. Had the application been to trace the freight as damaged, then, under the facts of the present case, this action would have been well founded. But, as matter of fact, the application made in the present case was to trace the freight as lost, and such application we think insufficient to put the carrier on notice that the freight had been damaged only, or to bind the carrier to do more after it had traced the freight to the hands of the consignee. Where freight is claimed to have been damaged, application should be made to the carrier to trace it as damaged, and to give the desired information as to such damage; and, no such application having been here made, the court erred in finding against the railway company. The Code sections relied upon do not, by either their express language or by necessary implication therefrom, require such a finding in this case; and, further than so required, we cannot hold the former rights of the carrier to be, by these sections, abrogated. Judgment reversed. All the justices concurring.

Merchants Dispatch Transp. Co. v. Hoskins

MERCHANTS DISPATCH TRANSP. CO.

v.

HOSKINS.

(Court of Appeals of Kentucky, Oct. 30, 1897.)

Value of Goods Lost—Burden of Proof.—The petition averred the total loss of the goods, stated their value, and set out a contract limiting defendant's responsibility for them in a number of particulars, and containing an agreement to deliver the goods safely to plaintiff. *Held*, that there was an implied promise by defendant to be responsible for them; and their value, as set out in the petition, not having been denied by the answer, did not have to be proved by plaintiff; section 153, Civ. Code of Kentucky to the contrary being no longer in force.

Rehearing denied.

PER CURIAM. The complaint by appellant's counsel is repeated on petition for rehearing, that the instructions of the trial court assumed the value of the goods in dispute to be as set out in the plaintiff's petition, and did not submit that question to the jury. Civ. Code 1854, § 153, provided that allegations of value or amount of damages could not be considered as true by the failure to controvert them; and under this provision, if it were in force, counsel would be right, and the authorities cited by him be in point. But since 1877 the law has been radically different, and now allegations concerning value or amount of damages, not accompanied by an allegation of an express promise, or by a statement of facts showing an implied promise to pay such value or damage, are not to be taken as true, although uncontroverted, but allegations so accompanied need not be proved unless traversed. Civ. Code, § 126. In this case the petition sets up the value of the goods, and a written contract under which the defendant agreed to deliver them safely to the plaintiff at their point of destination. In this contract the defendant

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limits its responsibility for the goods in a number of particulars, and by clear implication, if not in express terms, agrees to be responsible for their loss, except under the contingencies guarded against. The goods were wholly lost, as the petition averred; and of this, and of the fact of receiving the goods and agreeing to safely deliver them as the contract required, there is no denial in the answer, nor is there any denial of their value. We think there is an implied promise to be responsible for the value of the goods if not safely delivered, and a statement of facts in the petition, and the contract made part of it, raising such promise. *Ragsdale v. Lander*, 80 Ky. 61; *Harris v. Merz*, 82 Ky. 200. *Petition overruled.*

ALLAN

v.

PENNSYLVANIA R. Co.

(*Supreme Court of Pennsylvania, Nov. 8, 1897.*)

Carriers of Freight—Delivery—Contracts Limiting Liability*—A provision of a bill of lading that the goods shall be delivered on the carrier's platform at a certain station, the freight business at which is insufficient to justify the maintenance of structures for the protection of freight from the weather, and remain thereon at the shipper's risk until removed, is a valid limitation of the liability of a common carrier; and relieves the carrier from the duty of notifying the shipper of their arrival at such station.

Same.—And a railroad company delivering goods under such a contract is not liable for negligence upon the ground that the goods were unloaded from its car and left upon its platform during a rain storm.

APPEAL by defendant from Philadelphia county court of common pleas. *Reversed.*

John Hampton Barnes and Geo. Tucker Bispham,
for appellant.

*See note at end of case.

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Alfred J. Wilkinson and E. Hunn Hanson, for appellee.

WILLIAMS, J. The judgment appealed from in this case was rendered by the superior court. Four of the learned judges of that court concurred in the judgment. Three of them dissented from it. The questions that came under consideration are of public importance, and that they are by no means free from difficulty is shown by the wide differences of opinion entertained as to them by the members of the superior court. They may be stated thus: First. Is it an invariable rule in this state that a common carrier must give to the consignee of goods notice of their arrival at the point of destination? Second. May not special circumstances, a general custom or usage of business, or a special contract, modify or relieve against this duty? Third. If the second question be answered in the affirmative, is not this case, upon the evidence, one in which such modification should be held to exist? The evidence shows, substantially, that along the lines of the defendant's railroad there are small stations, known as "prepaid stations," at which no depot building has been erected, and no freight agent located. The business at such stations will not ordinarily justify the expense which such conveniences would involve, but the railroad company will accommodate people near such stations by delivering goods consigned to them on a platform, or on the ground, as the case may be. Among such prepaid stations was one called "Strafford." The only convenience at Strafford for the receipt and delivery of goods was a platform by the side of the road. There was no shelter, and no employee of the company to give notice of the arrival of goods at this station, up to the 7th day of October, 1893. It is alleged, and evidence was given upon the trial to show, that a custom exists among the railroads of the country for consignees of goods at such stations to look out for the arrival of their parcels, and take charge of them when they are set down from the train. It is not difficult to see how such a custom

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should grow out of the necessities of the situation in which both shippers and the carrier find themselves at such stations. Shippers know—for they are bound to know—that at a prepaid station they cannot expect notice from the carrier, nor attention or shelter for their goods, yet their wants are such that they may prefer to accept the risks rather than be compelled to go to some more remote station, where shelter exists and employees are abundant, to receive their goods. When persons so situated elect to have goods shipped to them at a prepaid station, there is no hardship in holding that they thereby assume to do for themselves what they know the railroad company cannot do for them. If we hold that a carrier is bound to give notice to the consignee of the arrival of goods at such stations, and keep them safely for a reasonable time, until they can be taken away, we simply compel the railroad company to abandon all such stations, and deprive the neighborhood of the accommodation which they afford. As there is no shelter there, the company cannot keep the goods for the owner. As there is no employee at the station, notice cannot be given. The carrier must transport the goods in the only way he can, or refuse to transport them to a prepaid station. If, therefore, the general rule as to notice be as contended for by the plaintiff where the ordinary facilities exist, we must nevertheless admit the existence of some exceptions, growing out of the special circumstances under which the carriage is undertaken, and out of the customs that have grown up for the mutual advantage of both shipper and carrier. But in this case we have an express contract, entered into because of the character of the station, and the refusal of the carrier to assume risks against which he cannot protect himself at the place for the delivery of the goods. In the bill of lading of February 22, 1894, there is the following provision: "When merchandise is destined to or from any way stations and platforms where station buildings have not been established by the carrier, or where there are no regularly appointed

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freight agents, it shall be at the risk of the owner until loaded into the cars, and when unloaded therefrom ; and, when received from or delivered on private turn-outs, it shall be at the owner's risk until cars are attached to, and after they are detached from, the train." The goods were received and transported under the terms of this agreement, by which the consignors undertook to receive the goods when they were put upon the platform at Strafford, and care for them at their own risk. If this was not done, it was not the fault of the carrier. He was to carry only, and all responsibility for protecting the goods, whether from thieves or from the weather, after reaching their destination, was assumed by the consignor, the owner. This contract the superior court held to be void, because against public policy, and cited as authority for such holding, among other cases, *Willock v. Railroad Co.*, 166 Pa. St. 184, 30 Atl. 948. But the cases cited are not exactly in point. In *Willock's Case* the question was whether the carrier could protect himself by a contract against the consequences of his own negligence or fraud. The headnote of the reporter is in these words ; "A common carrier cannot stipulate for a release from the consequences of his own negligence or fraud." The case does not hold that he may not by contract so modify his common-law liability as to enable him to serve small communities, where no station house has been built, and no employee located. Such stipulations have been upheld in many cases where no effort was made to shield the carrier from his own negligence, and they have been held not to violate any rule of public policy. *Atwood v. Transportation Co.*, 9 Watts, 87 ; *Bingham v. Rogers*, 6 Watts & S. 495 ; *Laing v. Colder*, 8 Pa. St. 479 ; *Express Co. v. Sands*, 55 Pa. St. 140 ; *Farnham v. Railroad Co.*, Id. 53 ; *Clyde v. Hubbard*, 88 Pa. St. 358 ; *Railroad Co. v. Raiordon*, 119 Pa. St. 577, 13 Atl. 324. The special contract relied on in this case does not stipulate for relief from the consequences of the negligence or fraud of the carrier. It recognizes the existence of circum-

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stances that make it practically impossible for the carrier to discharge all the common-law duties of a carrier at Strafford, and that induce him to refuse freight to that station, except upon special terms. It agrees, in view of these circumstances, to accept such service as the carrier can render, viz. the simple transportation of the goods, and to supply what the carrier is not prepared to supply,—the care and protection of the goods when they reach the platform. The contract limits the liability of the company to what it undertakes to do, and relieves it of responsibility for all that lies beyond the mere transportation and setting down of the goods.

It is asserted that the goods were unloaded during a storm, and were not protected by the carrier from the weather. By the contract, the consignor was to look after the goods on their arrival. It was his business to provide the shelter. He knew the company had none. He had agreed to take the risk of caring for them. When the accommodation train came that morning, at the usual hour for its arrival, the consignee was not at the platform. His foreman was not there, although he was expecting the goods, and had notice from the consignor of their shipment. What should be done? The contract of the carrier had been performed, and he had the right to unload the goods. He could not carry them to some station where he had a safe place for storage, and leave them there, for Strafford was the point of destination; and the carrier can neither deliver goods at a wrong place, or to a wrong person without liability to the owner. If the goods had filled the car, the car might have been left with the goods in it, but the goods did not fill the car. It contained other goods, to be delivered to other persons, and at other places. The only other way of preserving the goods from the weather would have been to hold the train until the rain was over before unloading the goods, but this was clearly impracticable. The alternative was to unload the goods, and leave the consignee to attend to them, as the shipper

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had agreed should be done. This the carrier did, and we see no negligence in his so doing. He did all he agreed to do, all he was employed to do, all he had the power to do. The complaint really is that he delivered the goods at the proper point of destination, in exact compliance with his undertaking. If, after they were put off at the station, they were damaged by being left in the rain, the consignee and his agent, who came a half an hour too late to the platform, must take the consequences of the risk assumed when the carriage of the goods was contracted for. We sustain the assignments of error, and reverse the judgment appealed from. A *venire facias de novo* is awarded, as there is another item in the plaintiff's claim, as to which negligence in the manner of unloading is alleged.

NOTE.

Common Carriers—Delivery of Goods at Flag Station—Contracts Limiting Liability.—A railroad company is not required by law to keep a warehouse or depot at every station along the line of its road, and may lawfully stipulate, either expressly or by implication, that it will assume no liability as a warehouseman at a "flag station," where it has no depot nor agent; and when the consignee is fully advised, at the time of shipment that the company has no depot nor agent at such station, and it is not shown that the exigencies of its business required that it should have an agent or depot at that place, the liability of the company as a common carrier terminates with the safe delivery of the goods on the side track at that point, and it assumes no liability as a warehouseman. *South and North Alabama Railroad Company v. Wood*, 9 Am. & Eng. R. R. Cas., 419. See also *Alabama etc., R. Co. v. Kidd*, 35 Ala. 299.

There was a custom that a railroad should deliver freight on the platform of minor stations, whose business would not justify a warehouse, to be received there by the consignee on discharge from the car. *Held*, a good custom, and to control the general law of liability of carriers. *McMasters v. Pennsylvania R. Co.*, 69 Pa. St. 374.

Notice to Consignee of Arrival of Goods.—The authorities are contradictory as to whether or not, in the case of carriers by railroad, the carrier, upon the arrival of goods at their destination, is bound to give the consignee notice of their arrival in order to terminate its liability as insurer and assume responsibility as warehouseman only.

Notice Held Not Essential.—The doctrine of the *Massachusetts* court, as announced in an early case, is that the carrier is under no obligation to give such notice; that its liability as carrier ceases

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upon the arrival of the goods at their destination and their storage in a proper warehouse, and is not affected by a failure to notify the consignee of the fact. *Norway Plains Co. v. Boston, etc., R. Co.*, 1 Gray (Mass.) 274, 61 Am. Dec. 423. See also *Rice v. Boston, etc., R. Corp.*, 98 Mass. 212; *Barron v. Eldridge*, 100 Mass. 455, 1 Am. Rep. 126; *Stowe v. New York, etc., R. Co.*, 113 Mass. 521; *Rice v. Hart*, 118 Mass. 201, 19 Am. Rep. 433.

This view has been followed in a large number of jurisdictions.

Alabama.—In this state it seems that no obligation rests on railroad carriers to give notice of the arrival of goods to the consignee in order to change their liability to that of warehousmen. *South, etc., Alabama R. Co. v. Wood*, 66 Ala. 167, 9 Am. & Eng. R. Cas. 419, 41 Am. Rep. 749; *Louisville, etc., R. Co. v. McGuire*, 79 Ala. 395; *Louisville, etc., R. Co. v. Oden*, 80 Ala. 39; *Columbus etc., R. Co. v. Ludden*, 89 Ala. 612, 42 Am. & Eng. R. Cas. 404. But see *Collins v. Alabama G. S. R. Co.*, 104 Ala. 390, 61 Am. & Eng. R. Cas. 229.

The rule is otherwise now by statute, where the destination of the goods is a city of two thousand or more inhabitants and having a daily mail. Code of Ala. § 1180; *Collins v. Alabama G. S. R. Co.*, 104 Ala. 390, 61 Am. & Eng. R. Cas. 229.

Georgia.—*South-western R. Co. v. Felder*, 46 Ga. 433. See also *Rome R. Co. v. Sullivan*, 14 Ga. 277. Compare *Richmond, etc., R. Co. v. White*, 88 Ga. 805.

Illinois.—In the case of *Chicago etc., R. Co. v. Scott*, 42 Ill. 132, BRESE, J., delivering the opinion, said that the better rule would be to require notice, but that the contrary rule was too firmly established in Illinois. See *Richards v. Michigan Southern, etc., R. Co.*, 20 Ill. 404; *Porter v. Chicago, etc., R. Co.*, 20 Ill. 407, 71 Am. Dec. 286; *Davis v. Michigan Southern, etc., R. Co.*, 20 Ill. 412; *Rothschild v. Michigan Cent. R. Co.*, 69 Ill. 164. Compare *Chicago, etc., R. Co. v. Sawyer* 69 Ill. 285, 18 Am. Rep. 613 (notice of arrival of bonded goods.)

The same rule applies to other corporations using railroads as a means of conveyance, where, by their usage, they merely undertake to deliver the goods at their depots. *Merchants' Dispatch Transp. Co. v. Hallock*, 64 Ill. 284.

Indiana.—*Bansemmer v. Toledo, etc., R. Co.*, 25 Ind. 434, 87 Am. Dec. 367; *Cincinnati, etc., Air Line R. Co. v. McCool*, 26 Ind. 140.

Iowa.—*Mohr v. Chicago, etc., R. Co.*, 40 Iowa 579; *Francis v. Dubuque, etc., R. Co.*, 25 Iowa, 60, 95 Am. Dec. 769.

Kentucky.—*Jeffersonville R. Co. v. Cleveland*, 2 Bush (Ky.) 468.

Missouri.—*Rankin v. Pacific R. Co.*, 55 Mo. 167; *Gashweiler v. Wabash, etc., R. Co.*, 83 Mo. 112, 25 Am. & Eng. R. Cas. 403, 53 Am. Rep. 558; *Eaton v. St. Louis, etc., R. Co.*, 12 Mo. App. 386; *Bergner v. Chicago, etc., R. Co.*, 13 Mo. App. 499; *Kansas City Transfer Co. v. Neiswanger*, 18 Mo. App. 103; *Buddy v. Wabash, etc., R. Co.*, 20 Mo. App. 209; *Pindell v. St. Louis, etc., R. Co.*, 34 Mo. App. 675. See also *Bell v. St. Louis, etc., R. Co.*, 6 Mo. App. 363; *Holtzclaw v. Duff*, 27 Mo. 395; *Cramer v. American Merchants' Union Express Co.*, 56 Mo. 528.

Notice should be given where the goods arrive out of time or where it is the custom of the parties for it to be given. *Frank v. Grand Tower etc., R. Co.*, 57 Mo. App. 181.

New Jersey.—A railroad company is not bound like carriers by

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wagon, to deliver to the owner at his place of business; nor, like carriers by water, to give notice of the arrival of the goods. *Morris, etc., R. Co. v. Ayres*, 29 N. J. L. 393, 80 Am. Dec. 215.

North Carolina.—*Neal v. Wilmington, etc., R. Co.*, 8 Jones L. (N. Car.) 482; *Hilliard v. Wilmington, etc., R. Co.*, 6 Jones L. (N. Car.) 343 (question discussed but not decided); *Chalk v. Charlotte, etc., R. Co.*, 85 N. Car. 423, 9 Am. & Eng. R. Cas. 106.

Pennsylvania.—*McCarty v. New York, etc., R. Co.*, 30 Pa. St. 247; *Shenk v. Philadelphia Steam Propeller Co.*, 60 Pa. St. 109, 100 Am. Dec. 541; *National Line Steamship Co. v. Smart*, 107 Pa. St. 492.

But the carrier is liable for a want of care in protecting the goods where it has not notified the consignee, although the station is one having no agent and it is a usage of the company to give no notice at such places. *Allan v. Pennsylvania R. Co.*, 5 Pa. Dist. Rep. 54.

South Carolina.—*Spears v. Spartanburg, etc., R. Co.*, 11 S. Car. 158.

Reasons for This View.—It is considered that the consignee is, or ought to be, advised by the shipper of the time the goods are to arrive, and that it is more reasonable to place the duty of keeping up with his own goods on the consignee than to burden the carrier with the duty of notifying every consignee of the time of arrival of every package passing through its hands.

In South, etc., *Alabama R. Co. v. Wood*, 66 Ala. 167, 9 Am. & Eng. R. Cas. 424, 41 Am. Rep. 749, the court, by SOMERVILLE, J., said: "It is not unreasonable in such cases to assume that the consignee has already been advised by the consignor of the fact that the goods have been forwarded to him. It would, too, be practically impossible to require such notice to each consignee, where the arrivals of goods by this mode of transportation are so frequent and various as is the case in populous emporiums of commerce and the great centres of railway traffic." See also to the same effect, *Norway Plains Co. v. Boston, etc., R. Co.*, 1 Gray (Mass.) 274, 61 Am. Dec. 423.

View that Notice is Essential.—The New Hampshire court, however, has taken a directly contrary view, and laid down the rule that until the consignee has been notified by the carrier of the arrival of his goods the carrier remains liable as insurer; it is considered unreasonable to insist that the consignee shall be in constant attendance upon the carrier's office to find out whether his goods have arrived; the carrier ought not to be permitted to assume the liability of a warehouseman only, until after notice to the consignee and the lapse of a reasonable time thereafter in which to take them away.

See *Moses v. Boston, etc., R. Co.*, 32 N. H. 523, 64 Am. Dec. 381.

This view of the doctrine also has the support of a large number of cases of high authority.

Canada.—*Richardson v. Canadian Pac. R. Co.*, 19 Ont. Rep. 369, 45 Am. & Eng. R. Cas. 413.

California.—Whatever the rule may have been, it is now required by statute that the carrier must give the consignee notice of the arrival of his goods. Cal. Civ. Code § 120; *Wilson v. California Cent. R. Co.*, 94 Cal. 166. See also *Jackson v. Sacramento Valley R. Co.*, 23 Cal. 268.

Kansas.—*Leavenworth, etc., R. Co. v. Maris*, 16 Kan. 333.

Kentucky.—*Jeffersonville R. Co. v. Cleveland*, 2 Bush (Ky.) 468.

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Louisiana.—Maignan *v.* New Orleans, etc., R. Co., 24 La. Ann. 333.

Maryland.—See Baltimore, etc., R. Co. *v.* Green, 25 Md. 72.

Michigan.—McMillan *v.* Michigan Southern, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; Michigan Cent. R. Co. *v.* Ward, 2 Mich. 538. See also Buckley *v.* Great Western R. Co. 18 Mich. 121.

Minnesota.—Pinney *v.* First Div. St. Paul, etc., R. Co., 19 Minn. 251, 20 Am. Ry. Rep. 71; Derosia *v.* Winona, etc., R. Co., 18 Minn. 133.

New York.—Mills *v.* Michigan Cent. R. Co., 45 N. Y. 622, 6 Am. Rep. 152; Hedges *v.* Hudson River R. Co., 49 N. Y. 223; Rawson *v.* Holland, 59 N. Y. 611, 17 Am. Rep. 394; Solomon *v.* Philadelphia, etc., Express Steamboat Co., 2 Daly (N. Y.) 104; McDonald *v.* Western R. Corp., 34 N. Y. 497; Sprague *v.* New York Cent. R. Co., 52 N. Y. 637; Dunham *v.* Boston, etc., R. Co., 46 Hun (N. Y.) 245; Sherman *v.* Hudson River R. Co., 64 N. Y. 254, *affirming* 5 Daly (N. Y.) 521; Zinn *v.* New Jersey Steamboat Co., 49 N. Y. 442, 10 Am. Rep. 402, 3 Am. Ry. Rep. 340; Browning *v.* Long Island R. Co., 2 Daly (N. Y.) 117.

Notice may be excused where a usage prevails which dispenses with it. Gibson *v.* Culver, 17 Wend. (N. Y.) 305, 31 Am. Dec. 297. Compare, however, Mierson *v.* Hope, 2 Sweeny (N. Y.) 561.

Ohio.—Hirsch *v.* Steamboat Quaker City, 2 Disney (Ohio) 144; Lake Erie, etc., R. Co. *v.* Hatch, 52 Ohio St. 408, 61 Am. & Eng. R. Cas. 293, *note*.

South Carolina.—Spears *v.* Spartanburg, etc., R. Co., 11 S. Car. 158.

Texas.—Houston, etc. R. Co. *v.* Adams, 49 Tex. 748, 30 Am. Rep. 116.

Vermont.—Onimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646; Blumenthal *v.* Brainerd, 38 Vt. 402, 91 Am. Dec. 350; Winslow *v.* Vermont, etc., R. Co., 42 Vt. 700, 1 Am. Rep. 365.

Wisconsin.—Wood *v.* Crocker, 18 Wis. 345, 86 Am. Dec. 773; Lemke *v.* Chicago, etc., R. Co., 39 Wis. 449.

Statutes Requiring Notice.—And in a number of the states it has been made the rule by special statute.

California.—The California Civ. Code § 2120, provides: "If for any reason a carrier does not deliver freight to the consignee or his agent personally, he must give notice to the consignee of its arrival and keep the same in safety, upon his responsibility as a warehouseman, until the consignee has had a reasonable time to remove it." It is held that "the plain meaning of this section seems to be that, in order to reduce the responsibility of the carrier to that of a warehouseman, the notice required by the section must be given." Wilson *v.* California Cent. R. Co., 94 Cal. 166. See also Hirshfield *v.* Central Pacific R. Co., 56 Cal. 484, 7 Am. & Eng. R. Cas. 398.

Tennessee.—There is a statute in Tennessee with the same provisions, but it appears not to affect the liability of the carrier. Tenn. M. & V. Code (1884), § 2788; Butler *v.* East Tennessee, etc., R. Co., 8 Lea (Tenn.) 33, 9 Am. & Eng. R. Cas. 249.

Alabama.—The law in Alabama is now regulated by § 1180 of the code, which provides that if the place of destination of freight is a city or town having two thousand or more inhabitants and a daily mail, the carrier is not relieved of the responsibility of a common

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carrier by reason of a deposit in its warehouse unless within twenty-four hours after the arrival of the freight notice thereof is given the consignee personally or by mail. See *Collins v. Alabama G. S. R. Co.*, 104 Ala. 390.

The *Texas* statute provides that a carrier shall remain liable as such until actual delivery to the consignee unless it has used due diligence to notify the consignee. See *Missouri Pac. R. Co. v. Haynes*, 72 Tex. 175, 37 Am. & Eng. R. Cas. 645; *Houston, etc., R. Co. v. Adams*, 49 Tex. 748, 30 Am. Rep. 116.

ILLINOIS CENT. R. CO.

v.

GROSS.

(*Supreme Court of Mississippi, Jan. 3, 1898.*)

Carriers of Freight—Loss of Goods—General and Special Contracts of Shipment.—In an action on a special contract of shipment to recover the value of two bales of cotton alleged to have been lost by defendant; plaintiff must show, there having been many shipments, out of which shipment it was lost.

Same.—And when such action is for a general shortage during an entire cotton season, the bales lost must be identified.

APPEAL by defendant from Madison county circuit court. *Reversed.*

This action was brought by C. L. Gross to recover the value of two bales of cotton, alleged to have been lost by defendant, upon this account: "Illinois Central Railroad Co. to C. L. Gross, Dr. To 2 B.C. short from the season 1894 & 95. 1000 lbs., at 10 cts., \$100.00; less freight, \$8.00. Balance, \$92.00. Shipped by Illinois Central Co. from August 9, 1894, to March 23d, 1895, 1075 bales of cotton to Barry, Thayer & Co. Boston, Massachusetts, and have accounted for them to me 1,073, making a shortage of 2 bales." There were about 100 bills of lading issued during the time covered by the account by defendant to plaintiff in evidence, and the cotton was transported to Boston over five different roads.

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J. B. Crisman and *Mayes & Harris*, for appellant.
W. H. Powell, for appellee.

WHITFIELD, J. This case is controlled by *Railroad Co. v. Provine*, 61 Miss. 288. It is manifest that, if this suit be regarded as on any special contract,—for particular shipment,—it cannot be maintained, because the plaintiff cannot show out of which shipment the cotton was lost. See opinion in *Provine's Case*, 61 Miss. 291, 292. The most favorable view that could be taken for appellee is to regard this as a suit for a general shortage in the entire cotton season. But, so treating it, appellee must still fail, because no cotton is identified as the two lost bales, and this is essential. *Provine* identified the four bales marked "A. F. P." Here nothing is identified, and the reason given for the failure—that the marks were obliterated by the appellant in transit—is wholly unsupported by any satisfactory proof. The plaintiff's loss is to be regretted ; but, at least, it is, perhaps, mainly due to his own negligence in not promptly following up the shipments, and thus being able to maintain his case. Reversed and remanded.

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— Loss of Goods —
General and Special
Contracts of
Shipment.

Same.

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NORFOLK & WESTERN RAILWAY COMPANY

v.

PINNACLE COAL COMPANY, *et al.**(Supreme Court of Appeals of West Virginia, April 2, 1898.)*

Carriers of Freight—Establishing Rates—Jurisdiction of Justices of the Peace.—In the absence of legislative enactment a justice of the peace has no authority to determine the rate of freight charges of a railroad corporation.

Carriers of Freight—Recovery of Overcharges—Remedies.*—Although a justice of the peace has jurisdiction of civil actions of debt, he exceeds his legitimate powers whenever he extends such jurisdiction to include matters of controversy or causes of action unknown to the common law, and unauthorized by legislative enactment.

Statutory Remedy—Effect of Repeal.—Where an enactment of the legislature which authorized such causes of action has been repealed, the jurisdiction of the justice of the peace over the same is repealed therewith, and he cannot under the pretense of deciding whether such enactment has been repealed or not, take jurisdiction of such causes of action, and if he does so, he is guilty of exceeding his legitimate powers, subjecting him to restraint by prohibition.

Same—Jurisdiction.—Under pretense of determining its jurisdiction an inferior tribunal cannot usurp a jurisdiction which is denied to it, nor having jurisdiction of the subject matter in controversy, abuse or exceed its legitimate powers.

Same.—The jurisdiction of inferior tribunals is fixed by law, and for such a tribunal, even though in good faith, to extend its jurisdiction beyond the limitations of law, is to make it guilty of usurpation and abuse of power.

Same—Writ of Prohibition.—In all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or having such jurisdiction, exceeds its legitimate powers, prohibition now lies as a matter of right, and not as a matter of sound judicial discretion.

Same—Repeal of Statute.—Articles VII and VIII, of section 82c, Ch. 54, Code, 1891, as to classification of freight and rates of charges therefor, are repealed by Ch. 17, Acts, 1895.

DENT, J. The case of the Norfolk & Western Railway Company against the Pinnacle Coal Company and others presents but a single important question and this is “when the legislature enacts a statute fixing a maximum rate of freight charges for railroad companies, and afterwards

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Effect of Repeal.**

*See note at end of case.

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repeals such enactment, has a justice of the peace the jurisdiction under the pretense of deciding whether such enactment has been repealed, to take cognizance of causes of action arising thereunder, hold such law still in force, and render judgment against alleged offending railroad companies for over-charge of freight? Our statute greatly simplifies the common law remedy of prohibition. It is as follows: Section 1, chapter 110, Code "The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power when the inferior court has not jurisdiction of the subject matter in controversy, or having such jurisdiction, exceeds its legitimate powers. "Two important changes are made in the common law. 1. The writ is no longer a matter of sound discretion but a matter of right. 2. It lies in all proper cases whether there is other remedy or not.

Prior to this enactment, which bears date in 1882, it was recognized as a concurrent remedy with appeal, writ of error, etc., only to be resorted to, however, when such other writs were inadequate. *Swinburn v. Smith*, 15 W. Va. 501; *High on Extraordinary Remedies*, Sections 770, 771; *People v. House*, 4 Utah, 369; *People v. Spiers*, same, 385. These two Utah Cases hold that when a justice is proceeding to try a case of which he has no jurisdiction, prohibition is the proper remedy, although an appeal would lie, as the latter is neither a speedy nor adequate remedy.

The reason why it is given as a concurrent remedy at common law is found, *High*, etc., Sec. 765. "Nor is it a writ of right granted *ex debito justitiae*, but rather one of sound judicial discretion, to be granted or withheld according to the circumstances of each particular case."

The statute of some other states, notably California, preserve the common law doctrine intact by the addition of the words where there "Is not a plain, speedy and adequate remedy in the ordinary course of law. Cal. Code Civ. Pro. secs. 1102, 1103. Our statute contains no such words of limitation, for the better reason that

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the legislature recognized the fact that in cases of usurpation of denied or abuse of conceded power on the part of an inferior tribunal prohibition alone would furnish a plain, speedy and adequate remedy, as it acts directly on the tribunal as well as the litigant. Appeals, writs of error and certiorari do not directly reach and cure the evil for the reason that it may become chronic, epidemic & highly damaging before these ordinary writs may be made effective. In cases of mere error, irregularity or mistake however gross, prohibition does not lie, not because as is oftentimes erroneously stated there exist other adequate remedies, or such remedies are inhibited, but for the reason that there has been no usurpation or abuse of power. In all cases within the purview of the statute prohibition lies as a matter of right without regard to other remedies. In applications for prohibition under the statute, the only important question for inquiry is as to whether the inferior tribunal is guilty of "usurpation and abuse of power" beyond its jurisdiction, or having jurisdiction of the subject matter, has it exceeded its "legitimate powers?" An affirmative answer grants the writ as a matter of right while a negative answer refuses it, though the applicant be bereft thereby of all remedy. In the present case, if the justice had jurisdiction of the matter in controversy, and did not exceed his legitimate powers, the writ must be denied, otherwise it issued as a matter of right, without regard to other remedies.

Carriers of Freight—
Recovery of Over-
charges—Remedies.

According to law, constitutional and statutory, a justice of the peace is given jurisdiction of all civil actions, except where the amount claimed, exclusive of interest and costs, exceeds three hundred dollars, or the title to real estate is involved, or the action is for false imprisonment, malicious prosecution, slander verbal or written, breach of marriage contract, or seduction. This includes all actions for the recovery of money when such recovery is authorized by common law or statutory enactment. And it impliedly follows that he has no jurisdiction of any cause of action unknown at common law, and not

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authorized by statute. The legislature has the right to create new causes of action for the recovery of money, but a justice of the peace has not, and when he attempts to create a new cause of action, he usurps legislative functions, and if he illegally extends a certain class of actions within his jurisdiction to include a new cause of action of his own creation he is guilty of exceeding his legitimate power. Nor can he excuse himself by claiming that he acted in good faith in accordance with the law, as he understood it, and had the right to decide it. For it is not a question of good faith or honest purpose, but an excess of legitimate powers and usurpation of jurisdiction over a subject matter of which the law gives him no control, and ignorance of law is no justification therefor. In every case of usurpation or abuse of power the inferior tribunal always determined jurisdiction in its own favor and so with excess of legitimate power, and if its holding affords the criterion to go by, there could never be any justification for the writ of prohibition, but it is because such court erroneously determines its own jurisdiction that the writ issues. High on Extraordinary Remedies, sec. 780.

Jurisdiction.

It always goes against a judicial tribunal and judicial action, and not that which is merely ministerial. A court that usurps jurisdiction only errs, but its error is of such a grievous nature as to call for prompt redress from a supervising tribunal. The statute uses the language "subject matter in controversy." What is the subject matter in controversy, but the cause of action in this case, overcharges of freight?

The mere money demand is neither the cause of action nor the subject matter of controversy.

Carriers of
Freight—Estab-
lishing Rates—Ju-
risdiction of Jus-
tice of The Peace.

It is simply the measure of damages. While the controverted fact is the right of the railroad company to fix its freight charges. This is a right that can only be taken from it by reasonable legislative enactment. And if the maximum fixed by the legislature is unreasonably low, the enactment has been

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lately held, in a case not yet reported by the Supreme Ct. of the United States to be void, as depriving the company of its property without due process of law. *Smyth v. Ames*, 18 Supreme Court Reports, 418. The question of the constitutionality of the act under consideration could not now be raised since it has been repealed. And yet a right which is denied to a state legislature is claimed to be within the jurisdiction of a justice of the peace. In short, that he is clothed with the power to say when the charges of a railroad company are reasonable, simply because he has jurisdiction of money demands and if the amount for which he gives judgment is less than that for which an appeal lies, the company is without remedy. This would be nothing less than legal robbery. The action of the justice is, justified under the color of law. A repealed statute is as though it never existed, and does not furnish color of law any more than if it had never been enacted. The only color of law the justice has is his own opinion. Nor does prohibition lie until this opinion takes the form of a judgment. It is said in High. sec.

Writ of Prohibition.

780. "When it does not appear that the tribunal against which the writ is sought has entertained jurisdiction of the matter in controversy, or that it has done any act showing an intention so to do, the relief will be denied, since *it is not to be presumed that such tribunal will act in a matter over which it has no jurisdiction.*" The justice must first err in his decision before he can be prohibited. Errors in excess of legitimate powers or abuse of jurisdiction are subject to prohibition, but errors of judgment in the proper trial of a matter within jurisdiction are not. Such as insufficiency of process or service, or statement of cause of action, weight of evidence, or regularity or form of judgment, or necessary rulings during the progress of the trial non-jurisdictional. It is said on High. etc., sec. 767 "In the exercise of the jurisdiction by prohibition, it is important to distinguish between the nature of the action which it is sought to prohibit, and the sufficiency of the cause of action, as stated in

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the proceedings in the pending litigation. The nature of the action itself determines the jurisdiction of the court over the subject matter, regardless of the sufficiency of its presentation or statement. If, therefore, the action is of such a nature as to fall within the jurisdiction of an inferior court, prohibition will not lie merely because of insufficiency in the statement of the cause of action in the pleadings, or because of insufficient proof to sustain the cause of action as stated. "There is a vast difference between stating a good cause of action imperfectly, and stating an illegal cause or ground of action. In the former case the justice would have jurisdiction, and in the latter case he would not have, except to deny the want thereof, and the claim that he assumes jurisdiction in good faith in ignorance of law would not excuse him. A justice of the peace manufactures jurisdiction for himself just as much where he creates new causes of action unknown to the common law and unauthorized by statute, as where he separates a claim beyond his jurisdiction into several causes of action within his jurisdiction. *Bodley v. Archibald*, 33 W. Va. 229. In the latter case strict justice may be done, though the justice act erroneously in assuming cognizance of such action, but in the former he cannot do justice otherwise than by denying jurisdiction.

For these reasons the judgment of the circuit court is reversed and the writ of prohibition as prayed for is awarded.

That Articles VII and VIII of Section 82c, Chapter 54, Code 1891, as to classification freight and rates of charges are repealed by Ch. 17 Repeal of Statute.

Acts 1895, is too plain for argument. For they are inconsistent therewith and expressly repealed by Section 5 of said last named act. As to this see Judge Brannon's dissenting opinion.

NOTE.

Carriers of Freight—Recovery of Overcharges—Remedies.—It is settled that the carrier may be compelled, in an action for money had and received, to repay any excess over the freight which may lawfully be charged.

Evershed v. London, etc., R. Co., 2 Q. B. Div. 254; 3 App. Cas.

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1029; *Great Western R. Co. v. Sutton*, L. R. 4 R. L. Cas. 226; *Fuller v. Chicago, etc., R. Co.*, 31 Iowa, 187; *Fisher v. New York Central, etc., R. Co.*, 46 N. Y. 644; *Mobile, etc., R. Co. v. Steiner* 61 Ala. 594; *Smith v. Chicago, etc., R. Co.*, 43 Wis. 686; *Graham v. Chicago, etc., R. Co.*, 53 Wis. 473.

In *Heiserman et al. v. Burlington, C. R. and N. R. Y. Co.*, 16 Am. & Eng. R. Cas. (Iowa) 49, BECK, J., in delivering the opinion of the court, said: "It will be observed that this action is not brought to recover the penalties for overcharges by the railroad companies, provided by chapter 68, Acts Fifteenth General Assembly, in force when the acts complained of by plaintiffs were done. The plaintiffs seek to recover the sums paid by them in excess of reasonable charges, and nothing more. The liability of defendant for money collected for the transportation of property, in excess of reasonable charges, existed at common law. The enactment of a statute imposing penalties for excessive charges, recoverable by the party injured, or providing that for exacting and collecting them the agent of the railroad company shall be guilty of a misdemeanor, does not take away the right existing at common law to recover money paid in excess of reasonable charges. See *City of Dubuque v. Ill. Cent. Ry. Co.*, 39 Iowa, 56; *City of Burlington v. B. & M. Ry. Co.*, 41 Iowa, 134; *Crittendon v. Wilson*, 5 Cow. 165; *Gooch v. Stevenson*, 13 Me. 371; *Candee v. Howard*, 37 N. Y. 653. The injured party may waive the tort created by statute and sue upon the implied contract raised by the law, whereby the carrier is obligated to repay to the consignee or consignor of the property all sums exacted in excess of reasonable compensation. Nor need the plaintiff, in a case brought to enforce such an obligation, show objection or protest prior to the payment made in excess of reasonable compensation. These rules are founded upon the consideration that railroad companies are public carriers, and those who employ them are in their power, and must bow to the rod of authority which they hold over consignors and consignees of property transported by them. If the consignor refuses to pay or contract to pay the charges fixed by the railroad company, his goods will not be carried; or, if the consignee refuses to make the payment demanded, the goods will not be delivered. In both cases great loss and even destruction of profitable business will result. If railroad companies should be held free from liability for excessive charges, the whole business of the country would be subject to unjust exactions resulting in oppression to citizens, and destructive to useful and profitable business. The law does not require objection or protest to the payment of unjust charges, for the reason that they would be vain, being addressed to those who occupy the commanding position of power to enforce obedience to their requirements. For another reason they are not required. Those who do business with railroads never come in contact with the officers who possess authority to fix or abate rates of charges; indeed, they usually hardly know their names, or where to find them. Their places of business are usually in cities distant from points where much of the property is received for transportation. If the consignee should be required to make objection or protest to these officers, delays would follow, resulting in loss; and, in the case of the shipment of some kinds of perishable property, in its decay. These considerations take the case from the operation of the familiar rule which forbids recovery

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on account of payments voluntarily made without objection or protest. This rule does not apply to cases of compulsory payments, and does not require objection and protest where they would be unavailing and vain. The doctrines we have expressed are supported by the following authorities: *Chicago & A. Ry. Co. v. Coal Co.*, 79 Ill. 121; *Mobile & M. Ry. Co. v. Steiner*, 61 Ala. 559; *Parker v. G. W. Ry. Co.*, 7 Man. & G. 253; *Harmony v. Bingham*, 12 N. Y. 99; *Chandler v. Sanger*, 114 Mass. 364; *Stephan v. Daniels*, 27 Ohio, 527; *Robinson v. Ezzell*, 72 N. C. 231; *Carew v. Rutherford*, 106 Mass. 1; *Lafayette & I. Ry. Co. v. Pattison*, 41 Ind. 312; *Philanthropic Building Ass'n v. McKnight*, 35 Pa. St. 470; *Wood v. Lake*, 13 Wis. 84; *Wheaton v. Hibbard*, 20 Johns. 290; *Thomas v. Shoemaker*, 6 Watts & S. 179; *Palmer v. Lord*, 6 Johns. Ch. 95; *State Bank v. Ensminger*, 7 Blackf. 105.

Overcharges made by a railway company may be recovered back as money had and received. *Parker v. Great Western R. Co.*, 7 M. & G. 253, 7 Scott N. R. 835, 8 Jur. 194, 13 L. J. C. P. 105, 3 Railw. Cas. 563; *Great Western R. Co. v. Sutton*, L. R. 4 H. L. Cas. 226, 38 L. J. Ex. 177, 18 W. R. 92.

In ordinary cases between individuals, where a person has no power to enforce an unjust claim but by legal remedies, and another pays it, he cannot recover it; both parties are on an equal footing. But when they are not on an equal footing and money is paid, not by compulsion of law but by compulsion of circumstances—as when it is paid to release goods from illegal restraint which cannot otherwise be reasonably effected, or to compel the performance of a duty by others in order to enjoy or obtain a right—it may be recovered back. Under this head may be classed moneys paid under color of title or charges on turnpikes and railroads. *McGregor v. Erie R. Co.*, 35 N. J. L. 89; *Mount Pleasant Mfg. Co. v. Cape Fear & Y. V. R. Co.*, 42 Am. & Eng. R. Cas. 498, 106 N. Car. 207, 10 S. E. Rep. 1046.

Under a grant to a railroad company of a right to take such tolls as it shall think reasonable, *it seems* that a person aggrieved by the exaction of unreasonable tolls would still have a remedy by an action at law, and that the courts would have power to determine whether the tolls charged were reasonable in fact. *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.

In *Beadle v. Kansas City, F. S. & M. R. Co.*, (Kan., April 8, 1893,) 32 Pac. Rep. 910, on rehearing, the Supreme Court of Kansas held that the act concerning railroads and common carriers, of 1883, giving a full and ample remedy to the shipper for the recovery back for any excess of overcharges received by the common carrier, beyond reasonable compensation, is a substitute for the remedy provided in such cases at common law. This court, in *Insurance v. Swayze*, 30 Kan. 118, referring to the General Statutes of 1868, c. 119, § 3, which prescribes that 'the common law, as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, shall remain in force, in aid of the General Statutes of this state', decided that the rule of the common law permitting an administrator to settle or compromise claims against an estate in his hands was superseded by the statute concerning the duties of administrators and the power of probate courts. At common law the carrier could recover what was reasonable, notwithstanding the overcharge, and the shipper had to pay to the

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carrier all over the excess claimed, and he could recover only the overcharge or excess. But under the statute of 1883 the shipper aggrieved may recover not only the overcharge or excess, but three times the actual damages sustained, together with the costs of the action and a reasonable attorney's fee. Therefore, if a shipper in this state is charged an unreasonable price for the transportation of his property or for the storing of his freight, or for the use of cars, or for any privilege or service afforded by a railroad company in the transaction of its business, in an action brought to recover the overcharge or excess, the facts alleged, which would give the shipper a cause of action under the common law, to recover back merely the overcharge or excess, will, under the statute, authorize him to recover three times his actual damages or overcharge, with costs, and attorney's fee. The legislature has not only enacted a statute which gives to the shipper all his remedy at the common law, but has conferred upon him further or additional rights. The statute gives a full and complete remedy to the shipper, who has been overcharged. It gives a better remedy than the common law, and therefore, in our opinion, it was intended by the legislature that this statute should supersede the common law concerning unreasonable prices or excessive charges. We do not think that a shipper may waive the statute, and avoid the limitation of one year, by an action at common law. The statute gives a full remedy, and when a full remedy is given thereby the parties are, and ought to be, confined to it. In a case very similar to this (*Young v. Railroad Co.*, *supra*), the Missouri court of appeals decided that 'a statute law and the common law may alike be repealed—(1) by repealing clause; (2) by such repugnance that the two laws may not, in reason, both stand; (3) by a revision of the whole subject-matter of the former law, which is evidently intended as a substitute for it. The two latter, being repeals by implication, are not favored, yet the courts are steadily and unhesitatingly applying and enforcing these rules whenever their terms cover the case in hand. Article 3, c. 21, Rev. St. 1879, concerning railroad classification and charges, repeals the common law under the second—certainly, at least, under the third—reason set out above; and a common-law action cannot be maintained in this state to recover the excess of overcharges exacted by it.' Opposing this, the rule is referred to upon the part of plaintiff, 'that a statute fixing a penalty for an offence does not, either expressly or by necessary implication, cut off the common-law prosecution or punishment for the same offence, and must be taken to intend merely as a cumulative remedy.' This rule we fully recognize, but it is based upon the theory that a penalty may not give a sufficient or full remedy to the party aggrieved, and, therefore, that a statute providing a penalty should not supersede the rights of the aggrieved party at the common law. *People v. Turnpike Road*, 23 Wend. 221-243; *Turnpike Road v. State of Maryland*, 19 Md. 239. Under the statute of 1883 the shipper aggrieved may not only recover the overcharge or excess, but three times the amount of the overcharge or excess; that is, treble damages. Therefore, while the action is in the nature of a penalty, it gives a sufficient remedy. The purpose of the statute is not merely to punish an offence against the public justice of the state, but to afford a private remedy to the person injured by the wrongful act. *Huntington v. Atrill*, 13 Sup. Ct. Rep. 224. The party aggrieved may

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recover a greater amount under the statute than at the common law. Counsel for plaintiff cites the following cases in support of his contention; *Clark v. Transportation Co.* (Mass.) 24 N. E. Rep. 49; *Cook v. Railway Co.* (Iowa), 50 Am. & Eng. R. Cas. 227; *Heiserman v. Railroad Co.*, 63 Iowa, 732, 16 Am. & Eng. R. Cas. 46. In the *Clark Case*, *supra*, the statute is, in substance, the English employers' liability act. The Kansas statute of 1874, concerning the 'liability of railroads,' is somewhat similar; but none of these statutes are a substitute for the common law liability of the master, because these statutes merely give a new or additional right. They make the master liable for all damages to an employee by the negligence of a co-employee, if the party injured is in the exercise of due care and diligence. They do not attempt to regulate the full relations of master and servant. The common law, under those statutes, remains in force, in aid thereof, to supply a remedy not provided for in the statutes. In the *Cook Case*, *supra*, no question was raised in regard to any statute, or as to whether a statute abrogated the common law. In *Heiserman v. Railroad Co.*, 63 Iowa, 732, 18 N. W. Rep. 903, it does not appear that the point was made that the statute referred to was intended as a revision of the common law. The last case is referred to and commented upon in *Young v. Railway Co.*, *supra*. Finally, it is claimed that the following provision of section 13 of the act of 1883 continues the common law in force as to overcharges: 'No railroad company shall be permitted, except as otherwise provided by regulation or order of the board, to change or limit its common-law liability as a common carrier.' Paragraph 1336, Gen. St. 1889. The statute referred to does not change or limit the common-law liability of a railroad company as a common carrier, but enlarges that liability. The action for the recovery of overcharges, under the statute, must be brought under subdivision 4 of section 18 of the Code, within one year; not three years. The overcharges, however, may all be recovered under the statute, as at common law, with additional damages or penalty. No regulation or order of the board is necessary for the recovery of such overcharges, and no order or regulation of the board can prevent the operation of section 19, c. 124, Sess. Laws 1883 (par. 1342, Gen. St. 1889), concerning the recovery of such overcharges. What is said of the common-law remedy against common carriers in *Beadle v. Railroad Co.*, 48 Kan. 379, by SIMPSON, C., is wholly *obiter*. The motion for rehearing will be denied.

In *Winsor Coal Co. v. Chicago & A. R. Co.*, 52 Fed. Rep. 716, it was held that the right of action at common law in favor of a shipper for extortionate charges was superseded in Missouri by the remedies provided by statute. Sections 1, 10, and 11 of the act of the legislature (Laws Mo. 1887, p. 15, Ex. Sess.), standing alone, would seem to entitle the shipper to recover triple damages from the common carrier for exacting unreasonable and unjust freight charges, whenever a jury might deem the rate unreasonable or unjust; but looking at the whole act, in connection with antecedent legislation, *in pari materia*, it is held that the triple liability does not arise where the carrier has not charged a rate in excess of the maximum rate established by the railroad commissioners, or the maximum rate permitted by the statute in the absence of any action thereon by the commissioners.

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ATCHISON T. & S. F. R. Co.

v.

CONSOLIDATED CATTLE CO.

(Supreme Court of Kansas, Feb. 5, 1898.)

Injuries to Cattle—Delay in Transportation—Parties—Right to be Heard by Counsel.—The parties to a lawsuit have an absolute right to be heard by counsel, not only at the trial of the issues of fact, but also on motions involving the substantial rights of the parties; and where the trial court refuses to hear any argument on a motion for a new trial of a case tried to a jury on conflicting oral testimony, and overrules the motion, and enters judgment on the verdict, the judgment will be reversed without inquiry by this court into its merits.

Master and Servant—Evidence—Declarations of Employees While Acting Within the Scope of Their Authority.*—In an action to recover damages from a railroad company for injuries to cattle caused by delay in the transportation of them, the declarations of the trainmen as to matters in the line of their respective duties, and relating to the cause of delay, made at the time and while they were charged with the duty of propelling the train, are admissible against the company. But such statements must relate to their conduct or duty at the time. Narrations of past occurrences or of matters concerning which the employee making the statement had no knowledge, and did not make in the discharge of any duty, are inadmissible.

Same—Parties.—One who sells cattle to be delivered at a distant place, and contracts with a railroad company to transport them to the place of delivery, has sufficient interest in the cattle to enable him to maintain an action against the railroad company to recover damages for delay in transporting them.

(Syllabus by the Court.)

ERROR by defendant to Sumner county superior court. *Reversed.*

A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiff in error.

W. W. Schwinn and Ivan D. Rogers, for defendant in error.

ALLEN, J., The Consolidated Cattle Company sold

*See note at end of case.

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P. Millheiser 320 head of three and four year old steers, to be delivered at Virgil, Kan. The sale was made at Clarendon, Tex. Thomas Carson, the general manager of the cattle company, made a written contract with the Ft. Worth & Denver City Railway Company for the transportation of the cattle to the place of delivery. The line of road of that company connects with the Atchison, Topeka & Santa Fe at Panhandle city. The cattle were loaded at Clarendon in 12 cars, and transported to Panhandle. At that place they were delivered to the Santa Fe Company under the written contract, which was ratified by its agent. The train proceeded at an ordinary rate of speed, with only one delay, of about half an hour, to within a short distance of Kiowa, Kan. There the engineer cut the engine off the train, and ran ahead to Kiowa for water. The engine was detached from the train between 4 and 5 o'clock on the morning of December 7th. It had been snowing during the night and some time in the morning the wind commenced to blow, and the snow to drift. It continued to blow with increased violence through the day, and the engine did not reach the train until about 11 o'clock on the morning of the 8th, when it was again coupled to the train, and proceeded without further delay to Wellington, where the cattle were unloaded and sold. This action was brought by the cattle company against the railroad company to recover damages for the injuries sustained by the cattle through the delay in transportation. It is alleged in the petition that the engine used was old and unfit for use; that by reason of its condition a sufficient quantity of water and coal could not be carried to supply it from one station to another; that the engine was detached from the train at the point where it was delayed near Kiowa, because the supply of coal and water had been so nearly exhausted that it could not draw the train; that the defendant's servants, after having coaled and watered the engine, negligently delayed returning to the train until the snowdrifts prevented them from doing so;

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and that the defendant was negligent in failing to provide and use proper appliances to enable the train to proceed within a reasonable time. At the trial a large amount of conflicting testimony was taken, on which the jury found for the plaintiff, and assessed its damages at \$2,575. Answers to special questions submitted were also returned. The defendant moved for a judgment in its favor on the special findings, notwithstanding the general verdict. It also moved for a new trial on all the statutory grounds. When these motions were called, counsel for the defendant asked to be heard in argument on both motions. The court refused to hear him, and rendered judgment in favor of the plaintiff on the verdict. This refusal is assigned as error.

The parties to a cause pending in a court have an absolute right to be heard, not only at the trial of the issue of fact, but also on the motions addressed to the court involving the merits of the controversy. While this exact question has perhaps never been presented to this court, the principle is declared in many cases.

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by Counsel.*

Douglass v. Hill, 29 Kan. 527; State v. Bridges, Id. 138; Railroad Co. v. Ryan, 49 Kan. 1, 30 Pac. 108; Larabee v. Hall, 50 Kan. 311, 31 Pac. 1062, and cases cited. No court is ever warranted in assuming that it fully understands the merits of a cause until it has heard the parties to it. It is always permissible to limit arguments of counsel to such reasonable time as may be necessary for the presentation of the matter under consideration. If the judge already has a well-defined opinion concerning the matter upon which he is about to pass, he may decline to hear the party in whose favor he intends to decide, but he should never refuse the other party a fair chance to convince him that he is about to commit an error. Possibly it might be held that the error in refusing to hear an argument on the motion for judgment on the special findings is not sufficient to warrant a reversal of the judgment, when this court is satisfied that the question was cor-

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rectly decided by the trial court. But the motion for a new trial involved, not merely the rulings of the court during the progress of the trial, the instructions to the jury, and other questions of law affecting the result, but also the merits of the whole case on the testimony. It was incumbent on the trial court to review the whole case, and to pass his judgment on the justice of the verdict. This court, it has been said in numberless cases, can never be in as favorable a position to weigh conflicting testimony and determine questions of fact from oral evidence as the trial court. On a motion for a new trial the attention of the court is for the first time challenged to the questions of fact in the case. It is at the same time challenged to all matters involved in its final determination. We cannot give any sanction to the denial to a party of all opportunity to be heard on a matter of such importance. The refusal of the court to hear argument on these motions is exceedingly unfortunate. We have before us a record of more than 800 pages. A retrial will be troublesome and expensive to the parties. It is very probable that an argument, no matter how extended, would have failed to induce the court to rule differently on the motion. A little time devoted to the hearing might have avoided all this unnecessary trouble. Yet we see no ground on which we can sustain a decision following an absolute denial of all right to be heard on the matter under consideration. While our reversal of the case will rest mainly on this error, some other questions likely to recur at another trial require attention.

Witnesses were permitted to testify to the statements made by the trainmen with reference to the cause of delay while the train was standing near Kiowa. These declarations were admitted as *res gestæ*. It is contended that some of them were in fact nothing but statements concerning past occurrences; that they were in the nature of admissions, and as such not binding on the railroad company. It is often a matter of much difficulty to determine just what declarations

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ployees While Act-
ing Within the
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are so connected with the transaction under consideration as to be properly admissible in evidence. The train with the plaintiff's cattle on board was at a standstill from early in the morning of the 7th till nearly noon of the 8th. During that time conversations were had between those in charge of the stock and the trainmen. Such statements as were made by the engineer and conductor, as reasons why they did not then proceed on the journey with the cattle, were admissible as a part of the *res gestæ*. So, also, communications made by the brakemen to the conductor with reference to the performance of their duties, and the existing condition of the train, were proper. But such statements as were mere narrations of past events, not explanatory of the existing condition of the train, should have been excluded. In *Mining Co. v. Dickson*, 55 Kan. 62, 39 Pac. 691, it was said: "The general rule is that admissions of an agent, in order to bind the principal, must be made in the course of his employment, and in connection with, and explanatory of, something that he does by authority of his employer. Mere narrations of past occurrences, or admissions disconnected from any service for his employer, are subject to the objections which exclude hearsay testimony." The trainmen were charged with the duty of transporting the cattle to their destination. They were the representatives of the railroad company in the performance of that service. Their conduct, and declarations explanatory of their conduct, were binding on the defendant. We do not deem it necessary to pass on each of the questions objected to. None of the objectionable testimony appears to us of such importance as to compell a reversal of the case, but on a retrial the court should enforce the rules governing the admission of such testimony with a little more care and strictness.

There is no merit in the claim that the plaintiff had not sufficient interest in the cattle to maintain this action. Though a sale to Millheiser had been agreed on, the cattle were to be delivered by the plaintiff at

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Virgil, Kan. Millheiser saw the cattle at Wellington, and refused to receive them in their damaged condition. The title to the property had not passed. They were in course of transportation under a contract made by the plaintiff with the defendant, and it is clear that the plaintiff had a right to maintain an action on it. Nor does there appear any difficulty with reference to the service of the notice required by the shipping contract, of the plaintiff's claim of damages. The defendant was informed both by verbal and by written notice of the plaintiff's claim, and had ample opportunity to inquire into the circumstances. The motion for judgment in favor of the defendant on the special findings is without merit, but for the reasons already stated the judgment must be reversed, and a new trial ordered. All the justices concurring.

Same—Parties.

NOTE.

Master and Servant—Declarations of Employees While Acting Within the Scope of Their Authority.—The sayings of the agents of a railroad company are admissible, and will bind the company only when made in the particular business intrusted to them, and while engaged in that business. *Johnson v. East Tenn., V. & G. R. Co.*, 90 Ga. 810, 17 S. E. Rep. 121. *Huntsville, B. L. & M. S. R. Co. v. Corpening*, 97 Ala. 681, 12 So. Rep. 295. *Verry v. Burlington, C. R. & M. R. Co.*, 47 Iowa 549.

McDermott v. Hannibal & St. J. R. Co., 28 Am. & Eng. R. Cas. 528, 87 Mo. 285. *Bevis v. Baltimore & O. R. Co.*, 26 Mo. App. 19. *Smith v. North Carolina R. Co.*, 68 N. Car. 107. *Southerland v. Wilmington & W. R. Co.*, 106 N. Car. 100, 11 S. E. Rep. 189. *Huntingdon & B. T. M. R. & C. Co. v. Decker*, 82 Pa. St. 119.

The conversation of an agent of defendant authorized to make and modify the contract sued on, had at the time concerning it and its terms, is proper evidence for the plaintiff. *Louisville, N. A. & C. R. Co. v. Henly*, 12 Am. & Eng. R. Cas. 301, 88 Ind. 535.

Declarations of an agent of a company, made to a contractor for the construction of the road, while inquiring of him as to the best mode of completing the construction, and while acting within his authority, are admissible in a suit on the contract. *Norwich & W. R. Co. v. Cahill*, 18 Conn. 484.

Where a passenger sues for an injury caused by the train running off the track at a place where it was being repaired, the declaration of the company's agent, who had charge of a gang of men relaying ties, "that there was sufficient time to relay them before the arrival of the train," is admissible against the company as

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part of the *res gestæ*. *Matteson v. New York C. R. Co.*, 62 Barb. (N. Y.) 364.

Representations and declarations made by the agent of the corporation in the course of the business intrusted to his particular care are binding upon the corporation, notwithstanding they produce evidence to show that he had no authority to make those declarations or representations. Persons dealing with the corporation by such an agent have a right to suppose that he has authority to speak for it relative to the business intrusted to his special care. *Schlessinger v. Adams Exp. Co.*, 9 Phila. (Pa.) 70.

The statements of a general freight agent of a railway company in regard to goods delivered to him for transportation, made at a time when the duty of the railroad to deliver the goods still existed, are admissible against the company, although made eight months after the delivery of the goods to him. *Burnside v. Grand Trunk R. Co.*, 47 N. H. 554.

Where a company is sued for the nondelivery of freight, declarations made by the freight agent at the place of delivery, to the effect that he thought it had been delivered to other parties, made in answer to inquiries for the freight, are admissible against the company. *Lane v. Boston & A. R. Co.*, 112 Mass. 455.

JOHNSON

v.

BOSTON & M. R. Co.

(*Supreme Court of Vermont, Aug. 5, 1897.*)

Transfer of Mail—Meeting Points.—A railroad company under contract to transfer mail at “meeting points” is under no obligation to transport mail to a station a half mile beyond the established route of another company, merely because the latter company saw fit to run its “connecting train” to the further station.

Construction of Mail Contracts—Implied Promise.—By the terms of his contract with the government the plaintiff was to carry all mails each way, between the defendant’s mail trains and certain “meeting points,” including transfers. At the same time the defendant was also under government contract to make transfers from its own cars at one of such points, but the plaintiff, thinking it was his duty to make all the transfers, did so, without any demand or request from the defendant that he should perform such service, though the latter claimed and understood that it was the plaintiff’s duty to make all transfers. *Held*, that the plaintiff did no more than he was bound to do under his contract; and could not recover upon the ground of an implied promise to him from the defendant to pay for transfers of mail from the cars of the latter.

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EXCEPTIONS by both parties from Orange county court. *Pro forma* judgment for defendant, and exceptions overruled. *Affirmed.*

Smith & Sloane, for plaintiff.

John Young, for defendant.

THOMPSON, J. 1. The contract under which the defendant carried the United States mails during the time in question required it, at "meeting points," to transfer mails to be forwarded by connecting trains to such trains. During that time the mail route over the Concord & Montreal Railroad, as established by the United States government, did not include the half mile of its track between Woodsville, N. H., and the Union Station at Wells River, Vt., at which point it connected with the road of the defendant; but all the regular mail trains of the Concord & Montreal Railroad ran from Woodsville to the Union Station at Wells River, where they exchanged mails to and from other trains entering that station, including the defendant's. A part of the service for which the plaintiff seeks to recover consisted in transferring the mails from the defendant's trains to those of the Concord & Montreal Railroad at the Union Station. If the latter were connecting trains at a meeting point, within the meaning of the defendant's contract for transporting the mails, then it was its duty, under its contract, to make such transfers of mail. If the Union Station at Wells River was not such a meeting point, as between the mail trains of the Concord & Montreal Railroad and those of the defendant, it is not contended by the plaintiff that it was the duty of defendant, to transfer mails from its trains to those of the Concord & Montreal Railroad at the Union Station. "Meeting points," as used in the defendant's contract with the government, must be construed to mean points where the defendant's mail route actually met and connected with other mail routes established by the government, and "connecting train" must be taken to mean a mail train connecting with

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another mail train at such meeting points. Hence the Union Station at Wells River was not a meeting point for the defendant as to the mail trains of the Concord & Montreal Railroad, the nearest point of whose mail route was at Woodsville, N. H., a half a mile distant from the Union Station. In law, this half mile was as effectual as a disconnection of the two mail routes as it would have been had it been a hundred miles. The duty of the defendant under its contract could not be enlarged upon by the fact that for its own convenience, or for some other reason, the Concord & Montreal Railroad saw fit to run its mail trains to the Union Station over the half mile of its track not included in its mail route, nor by the fact that the United States government did not object nor interfere to prevent it. Therefore the plaintiff cannot prevail on this contention, nor can he recover on this branch of the case.

2. The Union Station at Wells River was a meeting point as to the mail route over the Montpelier and Wells River Railroad, and its mail trains entering that station were connecting trains as to the defendant; and, as between itself and the government of the United States, it was its duty to transfer mails to be forwarded on mail trains of that road from its own trains to the mail trains of that road. The defendant does not claim but that such was the duty imposed upon it by its contract during the time in question, had the government seen fit to require it to make such transfers. The plaintiff made the transfers of the mails from the defendant's trains to the trains of the Montpelier & Wells River Railroad during that time, and he claims to recover for such service on an implied promise from the defendant to pay him. During the entire period covered by this service, except the last nine days thereof, the plaintiff was under a contract with the government of the United States, at a stipulated price, which was paid to him by the government, to carry the mails between the post office at Wells River and defendant's railroad and the

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post office at Woodsville, each way, as often as required, including transfers. By the terms of his contract, he was to carry all mails, each way, between the defendant's mail trains and the two post offices named. If the transfer of mails required by plaintiff's contract is limited to the defendant's mail trains and the two post offices specified, there is nothing left for the words "including transfers," in his contracts of 1886 and 1887, respectively, to operate upon. But they are to be given a meaning, if the subject-matter of the contract discloses anything to which this language is applicable. At the time these contracts were entered into by the plaintiff and the government, the mail trains of the defendant, the Concord and Montreal Railroad, and the Montpelier & Wells River Railroad, all entered the Union Station at Wells River, and required a transfer of mails to and from each other. In view of the fact that no particular mail train was named, and the further fact that in plaintiff's contract of October 5, 1893, with the government, the transfers were limited to "direct transfers between depots as often as required," his contracts prior to that date must be construed to include the transfer of all the mails to and from all the mail trains of the defendant entering the Union Station. Such was the construction given to his contracts prior to October 5, 1893, by both the plaintiff and defendant, and both acted under such construction during all the time in question. The last nine days of the alleged service by plaintiff accrued under his contract of the last-named date. In his brief he does not claim that he is entitled to recover for these nine days if he is not entitled to recover for the residue of the time. The construction put upon his contracts precludes his recovery on this branch of the case. It is no concern of his if the government saw fit, by its contract with him and its performance, to relieve the defendant from any duty imposed upon it by its contract. Were it to be held that the plaintiff was not acting within his contract in transferring the mails from the defendant's mail trains to those of the Montpelier & Wells River Railroad, he

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cannot recover of the defendant for that service on the ground of an implied contract. Strictly speaking, it is incorrect to say that the law implies an agreement. The agreement, if there be one, though not fully expressed in words, is nevertheless a genuine agreement of the parties. "It is implied only in this; that it is to be inferred from the acts or conduct of the parties, instead of from their spoken words. The engagement is signified by conduct instead of words. But acts intended to lead to a certain inference may express a promise as well as words would have done." *Bixby v. Moor*, 51 N. H. 403; *Rohr v. Baker*, 13 Or. 350, 10 Pac. 627. An express promise differs from an implied promise only in the evidence by which it is proved. In *Pollock on Contracts* (page 29) it is said: "Tacit proposals and acceptances must, like express ones, be communicated. If A., with B.'s knowledge, but without any express request, does work for B. such as people, as a rule, expect to be paid for, if B. accepts the work or its result, and if there are no special circumstances to show that A. meant to do the work for nothing, or that B. honestly believed that such was his intention, there is no difficulty in inferring a promise by B. to pay what A.'s labor is worth. And this is a pure inference of fact, the question being whether B.'s contract has been such that a reasonable man in A.'s position would understand from it that B. meant to treat the work as if done to his express order. The doing of the work with B.'s knowledge is the proposal of the contract, and B.'s conduct is the acceptance." "When the proposal itself is not express, then it must also be shown that the conduct relied on as conveying the proposal was such as to amount to a communication to the other party of the proposer's intention." *Day v. Caton*, 119 Mass. 513. Unless the party benefited has done some act from which his assent to pay for the service may fairly be inferred, he is not bound to pay. *Chadwick v. Knox*, 31 N. H. 226. As a general rule, *prima facie*, valuable manual services rendered by one person for another, the benefits of which are knowingly

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accepted and enjoyed by the latter. were not intended or understood as a donation. "Unless there is something in the relation of the parties, the nature of the services rendered, or other circumstances attending or surrounding the transaction, to rebut this presumption, a contract to pay for such services will be inferred from the acts and conduct of the parties. Hood v. League, 102 Ala. 228, 14 South. 572. Such presumption may be rebutted by evidence showing the nature of the services, the relation of the parties, or other circumstances, to be such as to preclude any inference that such services were to be paid for by the person sought to be charged therewith. 3 Am. & Eng. Enc. Law, 861. The circumstances in the case at bar rebut any such presumption or inference. The contracts under which the plaintiff acted were fairly susceptible of the construction which he and the defendant put upon them, if that were not the correct construction. The defendant claimed and understood that it was the duty of the plaintiff to make the transfers, and he knew, or ought to have known, as a careful, prudent man, under the circumstances, that the defendant so claimed and understood. The referee expressly finds that the plaintiff, while performing the service for which he seeks to recover, supposed that it came within the scope of his contracts. This precludes the idea that while rendering the service he expected the defendant would pay him therefor, or that the defendant knew, or ought to have known, that he expected pay therefor from it. Both parties then understood that the defendant was not to pay for such service. The plaintiff understood the government was to pay him, and did the work on its credit. This precludes a recovery from the defendant. Rohr v. Baker, 13 Or. 350, 10 Pac. 627. It also appears that the defendant never requested the plaintiff to perform such service, and the evidence did not disclose that the subject was ever mentioned between him and any officer of the defendant before he commenced the work, nor while it was being performed, nor until he notified the defendant that he should no

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longer do it, and ceased to do it, October 15, 1893. After the plaintiff entered into his contract with the government in 1886, the defendant, construing that contract to mean that plaintiff was to transfer all mails arriving at Wells River on the defendant's trains, discontinued making such transfers by its servants. The plaintiff was not called upon by the defendant nor by the government to make the transfers which the defendant had discontinued, but he, thinking that it might be his duty to make them, voluntarily proceeded to perform such service during the whole time in question. There was no such necessity for the plaintiff's interference, if he was not acting within his contract, as would authorize him to perform the service at the expense of the defendant, even though it were neglecting a duty under its contract. In this view of the case, he must be taken to be an officious volunteer, and therefore precluded from recovering. Keener, Quasi Cont. 349-351; Chadwick v. Knox, 31 N. H. 226. Judgment affirmed.

MISSOURI, K. & T. RY. CO.

v.

TURLEY.

(Circuit Court of Appeals, Eighth Circuit, Jan. 3, 1898.)

Carriers of Passengers—Fall from Platform While Waiting for Train—Contributory Negligence.*—In an action against a railroad company for personal injuries, it appeared from the evidence that plaintiff, a stranger in the locality, while waiting on a dark night to take passage on defendant's train, at a station in a small village, where defendant had no depot and sold no tickets, while attempting to sit down on the edge of defendant's platform, which was only intended to be used in boarding and alighting from its cars, stepped off and was injured. *Held*, that a verdict should have been directed for defendant, as requested.

*See note at end of case.

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Error by defendant to the United States Court of Appeals in the Indian Territory. *Reversed.*

Clifford L. Jackson, for plaintiff in error.

R. Sarlls, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. This is an action to recover damages for personal injuries, and arises on the following state of facts: At South McAlester, in the Indian Territory, the defendant railway company, plaintiff in error, maintained a platform for the use of passengers. The village then was small, and the travel at that point so little that it did not, in the judgment of the company, justify the erection of a depot building, or the keeping of a station agent. No tickets were sold, and through trains did not even stop there. The railroad track at this platform ran north and south. No railing was placed around the platform, and no lights were maintained there by the company. The plaintiff, accompanied by her sister, came to this platform on the night of January 30, 1892, to take passage on the south-bound train, due at 12 o'clock. The following are the specific allegations of the petition descriptive of the accident:

"That it was misting rain, and very dark, and, not being acquainted with said platform and surroundings, and not knowing its manner of construction, being a stranger in said town, and not being able to see the ground from the edge of the platform, and believing the platform to be the same elevation from the ground on the east side as it was on the west side, where she approached the same, she stepped off of the east side of the platform with the intention of sitting down on the edge of the same, and fell, and was seriously injured.

* * * That said platform is about eight feet wide, nearly level with the track on the west side, and about four feet high on the east side, where the plaintiff fell off the same, and extended at the time of said injury from the crossing of the Choctaw Railway to within

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about fifty feet of the street or road crossing in said town, a distance of about eighty yards, and was very high from the ground on the north end. That there were no steps to said platform. That the only practically accessible way of getting upon the same was to approach it from the west side. * * * That there was no railing on said platform, nor light at or about said platform or station, nor watchman or other person to guide or give warning, nor any provision whatever for her guidance and safety, or to enable her to see or know the danger and prevent her injury."

On this petition plaintiff recovered judgment in the trial court, which judgment was affirmed, after a remittitur, by the court of appeals in the Indian Territory, from which judgment the railway company has sued out a writ of error to this court. 37 S. W. 52.

No cause of action is predicable of such state of facts, for the obvious reason that it discloses the most palpable contributory negligence on the part of plaintiff. The substantive effect of the statement is that a stranger, unfamiliar with the surroundings of the platform, without lights or a guide, knowing it was not guarded by railing, when it was "misting rain, and very dark," purposely went to the edge of the platform, unfamiliar to her, to sit down on its edge; and without inquiry, or any precautionary examination, stepped off in the darkness of the night, on the bare assumption that the ground was, as where she entered upon the platform, level with the platform. To permit a recovery on such facts would be to annihilate the established doctrine of contributory negligence. As said by MR. JUSTICE FIELD in *Little v. Hackett*, 116 U. S. 371, 6 Sup. Ct. 391 :

"That one cannot recover damages for an injury to the commission of which he has directly contributed, is a rule of established law, and a principle of common justice. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties, which, if performed, would have prevented it. If his fault, whether by

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omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong."

While the ground of recovery can be no other nor broader than that alleged in the petition, the plaintiff's testimony does not cure the fatal infirmity of this petition. While waiting for the arrival of the train, her sister, who had with her two children, sat down on the edge of the platform, taking one of the smaller children in her lap. The plaintiff's testimony, in this connection, in chief, was as follows:

"Went right over to the platform, and sister and two children went over, and I did not notice her, and she sat down, and I thought she had stepped off and sat back, and I thought I was going to step on the ground and set back, and I was positive I seen the ground and was going to step on it, and when I stepped I went down about four feet."

On cross-examination she stated:

"We went to the platform, sister and I and two children. My sister sat down on the platform, and shoved her feet off, and took her boy in her arms, and the little girl asked if I would not sit down and take her. She was cold. The train was late, and I turned around, and saw sister setting there, and I thought she had stepped off and set down, and I looked and thought I could see that I could step off the side and set back on the platform. Looked down, and thought I could step down and set back; and when I stepped down I just went on."

Considering the entire statement, it is made manifest that the plaintiff was not induced to take the step she did into darkness, following the example of her sister, as she evidently sought to have the jury believe, because in the same connection, she described the manner in which her sister reached a sitting posture on the edge of the platform, "My sister sat down on the edge of the platform, and shoved her feet off." Why should her sister shove her feet off of the platform after sitting down, if it was level with the ground? The very

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method adopted by her sister was unmistakable admonition to a sane person—First, that the locality of the ground was not level with the platform; and, second, that by shoving her feet off they must have descended below. This should, in addition to the darkness of the night, and the unfamiliarity with the situation, have excited especial attention and precaution. But in a misting rain, and very dark, with no other precaution than a look of the eye, and without imitating the action of her sister, she stepped off into air. This was so reckless as to admit of no two opinions among reasonable men as to its negligent character. The platform, manifest to any person, was built for the sole purpose of ingress to and egress from the cars. Its edge was not designed for a place for passengers to go in the nighttime and sit upon. The plaintiff was not invited by anything naturally or incidentally connected with the use of the platform to so undertake to sit down on its edge. The accident was in no degree probably incident to the taking of passage on defendant's train. Such use of the edge of the platform, on a very dark night, was so disconnected and remote from the purpose of its construction as to preclude any possible admissible relation between the imputed neglect of the defendant to barricade the sides of or to light the platform, and an accident resulting as this did.

No parallel to this action is found in any recognized authorities. The case of *Railway Co. v. Neiswanger* (Kan. Sup.) 21 Pac. 582, principally relied upon by the court below, is not entirely this case, in that the plaintiff there did not purposely undertake to sit down on the edge of the platform, knowing that it was not protected, but undertook, under imperative necessity, to pass from the platform to seek permissible concealment, under circumstances that did not admit of deliberate movement. The exoneration from contributory negligence in that case was extreme, and ought not to be extended, lest its application should lead to a practical establishment of the doctrine that a railroad company is to be treated as an absolute insurer of the safety of pas-

Note

sengers waiting about its platform, however eccentric and thoughtless in their strolling movements. We prefer the better sustained rule recognized in *Forsyth v. Railroad Co.*, 103 Mass. 570 ; *Reed v. Railroad Co.*, 84 Va. 231, 4 S. E. 587; *Bennett v. Railway Co.*, 57 Conn. 422, 18 Atl. 668 ; *Railway Co. v. Hodges* (Tex. Civ. App.) 24 S. W. 563 ; *Chewning v. Railway Co.* (Ala.) 14 South. 204. These cases support the rule that, although a railway company may be guilty of some negligence in not providing sufficient lights or railings about its platform, yet when these deficiencies are known, or obvious to the passenger, and notwithstanding he sees fit voluntarily, without invitation from the company, and for his mere convenience, to undertake to pass over the edge of the platform, without knowledge of its elevation, the law will not excuse his negligence in taking no other precaution than a casual look when the night is so dark as to deceive the eye in appearances. The passenger ought not to cast the consequences resulting immediately from his own reckless impulse upon the railway company for not fencing or patrolling its platform, or flooding the ground around it with artificial lights.

As no cause of action is stated in the petition or established by the evidence, the instruction asked by the defendant at the close of the evidence, directing a verdict for defendant, should have been given. It is not necessary, therefore, to discuss other alleged errors in this record. The judgment herein of the court of appeals in the Indian Territory, as also that of the trial court, is reversed, and the cause is remanded to the United States court for the Northern district in the Indian Territory for further proceedings in conformity with this opinion.

NOTE.

Injuries to Passengers—Contributory Negligence.—To an action against a company, to recover damages sustained through the neglect by the company to keep its depot grounds and approaches in safe condition, contributory negligence is a complete defense.

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Montgomery & E. R. Co. *v.* Thompson, 77 Ala. 448, 54 Am. Rep. 72.

It is well settled that in order for a passenger to recover for an injury on the ground of negligence on the part of the carrier, it must appear that the plaintiff was in the exercise of due care in respect to the occurrence from which the injury arose, or that the injury was in no part due to his own fault or want of care.

Arkansas.—George *v.* St. Louis, etc., R. Co., 34 Ark. 613, 1 Am. & Eng. R. Cas. 294.

Georgia.—Macon, etc., R. Co. *v.* Johnson, 38 Ga. 409; Central R. Co. *v.* Thompson, 76 Ga. 770.

Illinois.—Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, 63 Am. Dec. 323.

Kentucky.—Kentucky Cent. R. Co. *v.* Dills, 4 Bush (Ky.) 593.

Louisiana.—Woods *v.* Jones, 34 La. Ann. 1086.

Missouri.—Weber *v.* Kansas City Cable R. Co., 100 Mo. 194, 18 Am. St. Rep. 541, 4 Am. & Eng. R. Cas. 117.

Pennsylvania.—Pennsylvania R. Co. *v.* Aspell, 28 Pa. St. 137, 62 Am. Dec. 323; Pittsburgh, etc., R. Co. *v.* Hinds, 53 Pa. St. 512, 91 Am. Dec. 224.

West Virginia.—Fisher *v.* West Virginia, etc., R. Co., 39 W. Va. 366, 58 Am. & Eng. R. Cas. 337.

Wisconsin.—Chamberlain *v.* Milwaukee, etc., R. Co., 7 Wis. 425.

SEALS

v.

AUGUSTA SOUTHERN R. CO.

(*Supreme Court of Georgia, March 4, 1898.*)

Carrying Passenger beyond Station—Nature of Action.—A petition against a railroad company for damages alleged to have been occasioned to the plaintiff by wrongfully carrying her past the station to which she had purchased a ticket should, though it sets forth in general terms a contract of carriage, and alleges facts showing a breach thereof, be treated as an action *ex delicto*, when it is manifest from the allegations and prayers of the petition, taken all together, that the plaintiff is seeking a recovery because of the defendant's breach of duty, and not on account of its breach of the contract.

Same—Sufficiency of Petition—Demurrer.—Even if such a petition is to some extent ambiguous, it should not be dismissed upon a special demurrer which characterizes it as an action *ex contractu*, containing paragraphs seeking a recovery of damages arising *ex delicto*; the demurrer, so far, as relating to this matter, not making the point that the petition should be dismissed on the ground of duplicity, but merely "praying" that these paragraphs be stricken.

Same—Sufficiency of Demurrer.—Where a petition contains several paragraphs, some of which set forth and pray for damages

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which may be properly said to have arisen from the wrongs complained of, a demurrer alleging in general terms that "said items of damage are too remote, and cannot be recovered," is not good. If any of such items are too remote to constitute the basis of a recovery, the same should be specifically pointed out.

(Syllabus by the Court.)

ERROR by plaintiff from Glascock county superior court. *Reversed.*

E. P. Davis and *C. W. Seals*, for plaintiff in error.
Leonard Phinizy, for defendant in error.

FISH, J. There was no merit in the first ground of the demurrer, which alleges that no cause of action is set forth in the plaintiff's petition. The second ground, that the plaintiff was a minor and the suit should have been brought by a guardian, was removed when the petition was, by the consent of the defendant and the order of the court, amended by inserting therein the name of Robert B. Seals, as next friend of the plaintiff, suing for her use.

1. The third ground of the demurrer is that the petition sets forth a breach of contract, and that the damages claimed by the plaintiff to have been sustained by her "are punitive, and are for torts, arise ex delicto, and cannot be recovered in an action for a breach of contract." The demurrer embraced a motion that these paragraphs be stricken, and that the plaintiff, in her recovery, be restricted to the actual damages flowing directly from the breach of the contract sued on. It was also alleged, under the third ground of the demurrer, that "said damages are too remote, and cannot be recovered." Using the language of CHIEF JUSTICE BLECKLEY in *Railroad Co. v. Roberts*, 91 Ga. 519, 18 S. E. 316, "in such an action as the present, where it is well founded, a recovery may be had for the injury as a tort, as a breach of a public duty by a common carrier,—a duty imposed by law,—though involving in this breach a breach of contract also." See, also, *Railway v. Brauss*, 70 Ga. 368; *Railroad Co. v. Pickett*, 87 Ga. 734, 13 S. E. 750. There is no question but what the plaintiff could have brought suit for a

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breach of the contract. The question, therefore, presented by this ground of the demurrer, is whether the petition of the plaintiff is an action for a breach of the private contract, or an action for a tort arising out of the breach of the public duty that the defendant owed to the plaintiff as one of its passengers. This question, we think, should be decided by construing all the allegations of the declaration together. In determining whether the action is *ex contractu* or *ex delicto*, we should not pick out particular paragraphs or allegations of the petition, and consider them as being isolated from all the others contained therein, but each of them should be construed in the light of its natural and logical relations to all of the others. So construing the petition, what was the cause of action upon which the plaintiff relied for a recovery? Was it a breach of the contract, or a breach of the legal duty incident to, and created by, the contract? While there is a general allegation in the first paragraph of the petition that the defendant has injured and damaged the plaintiff in the sum of \$1,000, there is no allegation as to damages sustained in the second or third paragraph, which are the only ones which set forth a contract of carriage, or allude to such a contract, nor any claim there, or elsewhere in the petition, that the plaintiff had been injured and damaged by reason of a noncompliance by the defendant with the implied terms of the contract. But the plaintiff, after setting forth in these paragraphs facts which show an implied contract on the part of the defendant to carry her from Augusta to Beall Spring station, and to stop the train upon which she was being transported, upon its reaching the latter point, in order that she might get off, alleges in the third paragraph "that the train did not stop at the Beall Spring station at which place she had intended to get off, and to which place she had purchased her ticket, but the train was run past the station at full speed, and petitioner was carried, against her will, to Mitchell, Georgia, to her great mental suffering, annoyance, and

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personal inconvenience.” This seems to clearly indicate that the plaintiff was suing for the tort, and the further particulars wherein she alleges that she was damaged as set forth in the paragraphs which follow are perfectly consistent with this view of the case. Some of the paragraphs demurred to, all of which, the demurrer avers, show that the damages therein claimed “are punitive, and are for torts, and arise *ex delicto*,” wind up with the averment, or its equivalent, “all to the damage of your petitioner in the sum of \$1,000.” It is necessary for a person suing a common carrier for damages arising out of the violation, as to him, of the public duty which it owes to a passenger, to allege facts showing that, at the time of the commission of the alleged tort, for which he seeks to recover damages, he sustained towards the defendant carrier the relation of a passenger. In this case, without the existence of a contract of carriage, the defendant would have owed no duty to the plaintiff as its passenger; and as it was necessary for her to show such a duty on the part of the defendant, as a basis from which the tort for which she sought to recover could have arisen, it was proper and necessary to allege facts sufficient to show an implied contract by the defendant to transport her from her point of departure to her point of destination, and to allow her, upon arrival at the latter, an opportunity to safely alight from the cars. As the allegations of the petition seem to show an intention on the part of the plaintiff to sue for the recovery of damages sustained by her in consequence of the breach of the public duty arising out of the contract of carriage, and not for damages resulting from a breach of the contract, those allegations which set forth the contract may well be taken as simply intended to lay the foundation for the introduction of evidence to show the existence of this public duty, preparatory to the introduction of further testimony to establish a violation of that duty amounting to the tort, which appears to be the real gist of the action. The essential facts which seem to be relied upon for a recovery constitute a tort. Cer-

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tainly, as against the demurrer filed by the defendant, the portion of the petition which sets forth the contract of carriage may be treated as mere matter of inducement, leading up to the real gravamen of the suit,—the tort founded upon the contract.

2. The special demurrer did not make the point that the petition should be dismissed on the ground of duplicity, nor for any other reason, but after characterizing it as an action *ex contractu*, containing paragraphs seeking to recover damages arising *ex delicto*, “prayed” that these particular paragraphs be stricken, and that the plaintiff, in her recovery, “be restricted to the actual damages flowing directly from the breach of the contract sued on.” Even if the petition were, to some extent, ambiguous, in not showing whether the suit was for a tort or a breach of the contract, it would have been error for the court to have dismissed it upon this demurrer. According to the opinion of this court in the case of Railroad Co. v. Pickett, 87 Ga. 736, 13 S. E. 750, if the petition had been subject to the charge of duplicity in the respect above indicated, and the defendant had demurred to it upon that ground, and had sought for that reason to dismiss it, the court below should either have dismissed the case, or required the plaintiff to so shape her allegations as to leave no doubt of the manner in which she sought to hold the defendant liable.

3. It is further alleged in the third ground of the demurrer that “said items of damage are too remote, and cannot be recovered.” As these items of damage include all damages alleged to have been sustained by reason of the breach of the duty which the defendant owed the plaintiff as its passenger, if, in any of the paragraphs demurred to, there are damages claimed which may properly be said to have arisen from the alleged tortious conduct of the defendant, a demurrer which by its sweeping terms covers every item of alleged damages cannot be sustained. To sustain such a demurrer

Same—Sufficiency
of Petition—De-
murrer.

Same—Suf-
ficiency of
Demurrer.

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would be to hold that all of the damages claimed are too remote. It is too apparent for discussion that, if the allegations which set forth the tort complained of are true, the plaintiff is entitled to recover some damages on this account. Certainly she would be entitled to recover for any inconveniences, physical hardships, or sufferings which were not needlessly incurred by her, but which were the proximate result of the tort committed by the defendant, and it is equally clear that the petition contains allegations which cover such items as these. If any of the items of alleged damages are too remote to constitute the basis of a recovery, the same should have been specifically pointed out in the demurrer. Judgment reversed. All the justices concurring.

CHICAGO PACKING & PROVISION CO.

v.

SAVANNAH, F. & W. RY. CO.

(*Supreme Court of Georgia, Nov. 29, 1897.*)

Bills of Lading—Delivery of Goods to Endorsee.*—When goods are shipped under a bill of lading stipulating for their delivery to the order of the consignor, an indorsement by him upon the bill of lading directing delivery to a third person, or to his order, for collection, in effect makes such person the consignee; and, although such bill of lading may further stipulate that its surrender shall be required before the delivery of the goods at destination, delivery by the carrier without requiring such surrender, if made to such consignee, or upon his order or by his authority, involves no breach of duty to the consignor.

Same—Partnership as Endorsee.—Where in such case the bill of lading was indorsed to a partnership, the carrier was authorized to deliver upon a written order signed by one of the partners, though he may have privately intended the signing of the order to be his individual act only; the carrier's agent having no information to this effect, and the circumstances being such as to warrant him in treating the giving of the order as the act of the partnership.

Same—Evidence—Verdict.—The evidence in the present case demanded a verdict for the defendant.

(Syllabus by the Court.)

*See note at end of case.

Chicago P. & P. Co. v. Savannah F. & W. Ry. Co

Error by plaintiff from Dougherty county superior court. *Affirmed.*

Wooten & Wooten, for plaintiff in error.

Erwin Du Bignon and *Chisholm W. L. Clay*, for defendant in error.

LUMPKIN, P. J. This was an action by the Chicago Packing & Provision Company against the Savannah, Florida & Western Railway Company for damages alleged to have been occasioned to the plaintiff because of a wrongful delivery by the defendant of certain meat to N. L. Ragan. The court directed a verdict for the defendant, and the plaintiff excepted.

It appeared at the trial that the plaintiff had shipped the meat in question to Albany, Ga., consigned to its own order, under bills of lading each of which contained a direction to notify Ragan, and each stipulating that its surrender should be required by the carrier before delivery of the goods at destination. Upon each of these bills of lading was an entry in the following words, signed by the plaintiff: "Delivery to Hobbs & Tucker, or order, for collection." Clark, the agent of the railway company at Albany, without requiring a surrender of the bills of lading, delivered the meat to Ragan upon written orders which were as follows:

"E. N. Clark, Agent: Let N. L. Ragan have car meat on dray track, and I will be responsible for BL. May 18th, 1893. A. W. Tucker."

"Ed. N. Clark, Agent: Please let Nevil [meaning Ragan] have one car meat, and I will stand for BL. Yours, truly, A. W. Tucker."

Tucker testified, in substance, that, in giving the above orders to Ragan, it was his private intention that so doing should be regarded as his individual acts; but he did not so inform Clark, the agent. The circumstances, as disclosed by the evidence, were such as to warrant the latter in treating the giving of these orders as acts of Hobbs & Tucker; that firm being at the time in possession of the bills of lading. It further

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appeared that, at the time the meat was delivered to Ragan, he had not paid to Hobbs & Tucker drafts drawn on him by the plaintiff for the price of the meat, which drafts had been forwarded to Hobbs & Tucker along with the bills of lading. Upon substantially the same state of facts as above recited, this same plaintiff had previously brought an action of bail trover against Hobbs & Tucker, and obtained a judgment thereon, which was affirmed by this court. See 98 Ga. 576, 25 S. E. 584. The question now is, was the railway company also liable to the plaintiff? If a natural person consigned goods to his own order under a bill of lading of the character above indicated, and called in person upon the carrier's agent at the point of destination, demanded a delivery of the goods, and thereupon received the same, it certainly could not be questioned that, as between the consignor and the carrier, such delivery would be good, and would free the carrier from further liability to the consignor, although the bill of lading may not have been produced and surrendered in accordance with the stipulation therein contained. While in such a case the carrier might not, as against one who had in good faith and in due course of business obtained the bill of lading properly indorsed, be protected by a delivery to the original consignor, surely the latter would have no cause of complaint against the carrier. If such consignor could thus obtain a delivery of the goods to himself in person, what difference in principle would it make if, instead of doing this, he by a written order directed delivery to another, who obtained the goods upon such order without producing and surrendering the bill of lading? In either case, looking at the transaction with reference only to the consignor and the carrier, the latter would have done all that the former had any right to require of it. In other words, the stipulation in such a bill of lading, requiring its surrender upon delivery of the goods, is for the benefit of the carrier, and not that of the consignor. The plaintiff in the present action was not a natural person, but

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it made Hobbs & Tucker its agents, and directed delivery to them, or to their order. Treating the papers signed by A. W. Tucker as orders of the firm, the carrier complied with its contract with the Chicago Packing & Provision Company when it delivered the meat upon these orders. The effect of the indorsement

*Bills of Lading—
Delivery of Goods
to Endorsee.*

entered upon the bills of lading was, as between the consignor and the railway company to make Hobbs & Tucker the real consignees. In the case of *Boatmen's Sav. Bank v. Western & A. R. Co.*, 81 Ga. 221, 7 S. E. 125, this court held that where goods were shipped to the consignor's order, the bill of lading being indorsed in blank and negotiated for value as security for a draft drawn by the consignor on a third person, he being the party to be notified of the shipment, the carrier had no right, as against an innocent holder of the bill of lading, who had acquired the same in due course of trade, to make delivery to such third person without his producing the bill of lading, "or authority from the holder thereof." Here was a clear recognition of the protection which the law gives to the innocent holder of a bill of lading thus acquired, and also a strong intimation that authority for delivery from the legal holder or owner of the bill of lading would be sufficient to authorize delivery without a production of the bill of lading itself. It was, however, insisted here that, even assuming the above reasoning to be perfectly sound and correct, it was not strictly applicable to the present case, because the indorsement directing delivery to Hobbs & Tucker, or order, was not general in its terms, but qualified by the use of the words "for collection." In this connection, the position was taken that the order for delivery to Hobbs & Tucker was not absolute, but to a certain extent conditional, and therefore the railway company could not safely and lawfully make delivery upon the order of this firm, unaccompanied by the bills of lading, without first ascertaining that Hobbs & Tucker had actually collected from Ragan the price of the meat. The contention was that Hobbs & Tucker

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were special agents of the Chicago Company, and that in dealing with them as such the railway company was bound to inquire into the extent of their authority. We do not think this is a case where the rule thus sought to be invoked is applicable. Hobbs & Tucker, under the facts recited, were the agents of the plaintiff through whom it sought and obtained delivery to itself under the terms of its contract with the carrier. The railway company did exactly what it agreed to do when it delivered the goods to the order of Hobbs & Tucker, and it had no concern with the plaintiff's reasons for giving this order or its purpose in so doing. The important right reserved by the plaintiff in its contract with the carrier was to name the person to whom delivery should be made in its behalf at the point of destination; and accordingly the plaintiff had no right to impose any obligation upon the carrier with reference to delivery upon its order, further than that which the law imposed upon the carrier, of exercising due diligence in ascertaining the identity of the person to whom delivery was directed to be made. Nor would it seem that the plaintiff ever contemplated that the defendant should do more than it was, under its contract, bound to do. The words "for collection" were vital as between Hobbs & Tucker and the plaintiff, as restrictive of the firm's authority to dispose of the goods after receiving them from the carrier, but were not even intended as qualifying the right of the firm to demand of the carrier a full and complete possession of the goods. In other words, the collection which Hobbs & Tucker were to make from Ragan was a matter to be attended to by them, as the agents of the plaintiff, after they had obtained possession of the meat. It was their duty to get the meat and hold it till Ragan paid for it, but this was a matter of no concern to the railway company. It certainly was not the consignor's resident collecting agent at the point of destination. The drafts were not sent to it, the bills of lading were not entrusted to it, and its relation to the transaction

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was that of carrier only. In a word, the company was not the plaintiff's agent for any purpose whatsoever, and it never in any manner undertook to vouch for the fidelity of Hobbs & Tucker, who were the trusted agents of the plaintiff, and to whom alone it looked for the collection of its money before its meat went into the possession of Ragan. In any view of the matter, the familiar rule that, where one of two innocent persons must suffer loss, it should fall upon the party who put it in the power of the wrongdoer to occasion the loss, is applicable here. The loss in the present case was not occasioned by the failure of the railway company to require the production and surrender of the bills of lading, but by the faithlessness of Hobbs & Tucker to their principal. Indeed, after the orders for the meat were given to Ragan, Hobbs & Tucker really held the bills of lading for the protection of the carrier, and the only risk it took was the possibility of that firm's indorsing the same to bona fide purchasers for value. In not insisting upon the surrender of the bills of lading as a prerequisite to delivery, the carrier simply waived a right which, as against the original consignor, it had reserved to itself under the terms of the contract of shipment. We are aware that in some jurisdictions there are decisions at least intimating, if not directly holding, contrary to some of the views above expressed; but, notwithstanding this, we are confident that we have ascertained and announced the true law of the present case.

As to the fact that Tucker alone signed the orders upon which Clark, the agent of the railway company, delivered the meat to Ragan, it is only necessary to say that, upon the identical state of facts here presented with reference to this matter, this court, in the case first cited *supra*, held that the acts of Tucker in giving the orders in question were properly treated by the agent to whom they were addressed as the acts of the firm itself. Judgment affirmed. All the justices concurring.

Same—Partnership
as Endorsee.

NOTE.

Bills of Lading—Transfer by Endorsement and Delivery.—Bills of lading are symbols of property, and when properly endorsed, operate as a delivery of the property itself, investing the endorsees with a constructive custody, which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery of the property, under and in pursuance of the bill of lading, to the person entitled to receive the same. *Railroad Co. v. Stern*, 119 Pa. St. 24, 35 Am. & Eng. R. Cas. 551; *Gates v. Railroad Co.*, 42 Neb. 379; *Union Pac. Ry. Co. v. Johnson*, 2 Am. & Eng. R. Cas., N. S., 604.

The transfer of a bill of lading so as to pass to the transferee for value whatever title the transferee had at the time may be by indorsement and delivery of the instrument. *Dows v. National Exch. Bank*, 91 U. S. 618; *Illinois Cent. R. Co. v. Southern Bank*, 41 Ill. App. 287; *Skilling v. Bollman*, 6 Mo. App. 76 *affirmed* 73 Mo. 665, 39 Am. Rep. 537; *Kirkpatrick v. Kansas City, etc., R. Co.*, 86 Mo. 341; *Valle v. Cerre*, 36 Mo. 575, 88 Am. Dec. 161; *Davenport Nat. Bank v. Homeyer*, 45 Mo. 145, 100 Am. Dec. 363; *Missouri Pac. R. Co. v. McLiney*, 32 Mo. App. 166; *Dickson v. Merchants' Elevator Co.*, 44 Mo. App. 498; *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 199, 27 Am. St. Rep. 861.

In England, by an act of Parliament (18 and 19 Vict., c. 111), a bill of lading has in effect been made transferable by indorsement, so that an action may be brought upon it in the name of the indorsee. In the preamble to the English Bills of Lading Act of 1855 (18 and 19 Vict., c. 111), it is said that "by the custom of merchants a bill of lading of goods being transferable by indorsement, the property in the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property."

And by section 1 of the act it is provided that "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

This statute has been construed in the following cases: *The Figlia Maggiore*, L. R. 2 Adm. & Eccl. 106; *The ship Freedom v. Simmonds*, L. R. 3 P. C. 594; *The Felix*, L. R. 2 Adm. & Eccl. 273; *Lewis v. M'Kee*, L. R. 2 Exch. 37; *The Mepoter*, L. R. 1 Adm. & Eccl. 375; *Dracachi v. Anglo-Egyptian Nav. Co.*, L. R. 3 C. P. 190; *The Helene*, B. & L. 415; *Short v. Simpson*, L. R. 1 C. P. 248; *Smurthwaite v. Wilkins*, 11 C. B. N. S. 842, 103, E. C. L. 842; *Sewell v. Burdick*, L. R. 10 App. 74; *Jessel v. Bath*, L. R. 2 Exch. 267.

In the United States it has been held that under a statutory provision such has been adopted in most of the states, authorizing the real party in interest to sue in his own name on any contract which has been transferred to him, the common-law rule that the assignment of a bill of lading does not transfer rights upon the contract, and that an action founded on the express contract contained in the instrument must be brought by the original party to the contract, does not apply. *Merchants Bank v. Union R., etc., Co.*, 69 N. Y. 373.

Statutes have been enacted in a number of the states of the Union

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by which bills of lading, and certain other instruments of a like character, are assimilated in a greater or less degree to instruments strictly negotiable. Statutes making bills of lading negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, have been construed as only prescribing the manner of negotiation, *i. e.*, by indorsement and delivery; it has been held that such statutory provisions do not have the effect of totally changing the character of bills of lading and placing them in all respects on the footing of negotiable instruments proper, so as to charge their negotiation with all the consequences which usually attend or follow the negotiation of bills and notes. *Shaw v. Railroad Co.*, 101 U. S. 557; *National Bank of Commerce v. Chicago, etc., R. Co.*, 44 Minn. 224, 20 Am. St. Rep. 566.

RALEIGH & G. R. Co. *et al.*

v.

LOWE.

(Supreme Court of Georgia, June 9, 1897.)

Bills of Lading—Negotiability.*—While a bill of lading stipulating for the delivery of the goods therein described to consignor's order is, in a general sense, "negotiable," it is not so within the meaning of this term as applied to bills of exchange, but is rather a symbol or representative of the goods themselves.

Theft of Bills of Lading—Delivery of Goods to Thief.—Consequently, where such a bill of lading, without fault or negligence on the part of an agent of the owner to whom it had been sent, was stolen, the carrier would not, if it delivered the goods to the thief, upon his surrender of the bill of lading, be protected from liability to the owner as for a conversion, though the bill of lading was duly indorsed, and the delivery was made in perfect good faith. The contrary would be true if the theft was due to the negligence of such agent; and whether or not such negligence existed should be determined by a jury, unless the evidence on this subject unequivocally demanded a finding one way or the other.

Liability of Carriers.—Where, however, the carrier did not deliver upon the faith of the bill of lading, but had, before it was stolen, already delivered to a person for whom it had reason to believe that the goods were ultimately intended, taking his check to indemnify itself against loss because of such unauthorized delivery, a bank, which, as the owner's agent, was the lawful custodian of the bill of lading, but which had no knowledge of the facts above recited, was under no duty to the carrier of so guarding the possession of the instrument as to protect the latter from loss occasioned by surrend-

*See note at end of case.

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ering the indemnifying check, in consequence of the production of the bill of lading by an unauthorized person, who thus obtained payment for the goods from the party to whom they had been delivered, and, as a result, induced the carrier to believe that the transaction was lawfully ended. It makes no difference that the unauthorized person above referred to was the party who was to be notified of the consignment, and whose name appeared upon the bill of lading in this connection. Under such circumstances, negligence of the bank in losing possession of the bill of lading was not a matter of which the carrier had any legal right to complain, and, upon the bank's reimbursing the consignor for the loss of the goods, an action in the latter's name, for the bank's use, was maintainable against the carrier.

Directing Verdict—Evidence.—In view of the undisputed facts disclosed by the record, it follows from the foregoing that the court committed no error in refusing to allow the defendant's special plea to be filed, or in ordering the same to be stricken, or in directing a verdict for the plaintiff.

(Syllabus by the Court.)

ERROR by both parties from Atlanta city court; H. M. REID, Judge. Judgment for plaintiff affirmed.

Erwin, Cobb & Woolley, for plaintiff.

King & Anderson, for defendants.

FISH, J. 1. The law is well settled that, while a bill of lading stipulating for the delivery of the goods therein described to the consignor's order is, in a general sense, "negotiable," it is not so within the meaning of the term as applied to bills of exchange, but is rather a symbol or representative of the goods themselves. Except where the rules of the common law and mercantile usage have been modified by statute, the transfer of a bill of lading by indorsement and delivery passes to the indorsee only such rights to, or property in, the goods covered by the bill as the transferror himself has, and as it is the intention of the parties shall be conveyed. The rule that possession carries evidence of title so as to protect *bona fide* purchasers in the usual course of trade is, in the absence of a statute to the contrary, limited to negotiable paper, such as bills of exchange and promissory notes, and to money, bank bills, or other recognized currency, and does not apply to bills of lading, which answer a different purpose, and perform different

Bills of Lading—
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functions. They are not the representatives of money, are not used for transmission of money, nor for the payment of debts, nor for purchases. They are regarded as so much cotton, grain, iron, or other articles of merchandise, in that they are symbols of ownership of the property mentioned in them, and a transfer of the symbol does not operate more than a transfer of what it represents. *Gurney v. Behrend*, 3 El. & Bl. 633; *Stollenwerck v. Thacher*, 115 Mass. 224; *Tison v. Howard*, 57 Ga. 410; *Planters' Rice Mill Co. v. Merchants' Nat. Bank*, 78 Ga. 574, 3 S. E. 327; *Haas v. Railroad Co.*, 81 Ga. 792, 7 S. E. 629; *Shaw v. Railroad Co.*, 101 U. S. 557; *Pollard v. Vinton*, 105 U. S. 8; *Friedlander v. Railway Co.*, 130 U. S. 424, 9 Sup. Ct. 570.

2. As no sale of stolen goods, though to a *bona fide* purchaser for value, can divest ownership of the person from whom they were stolen, it follows that the sale of a stolen bill of lading, the symbol or mere representative of the goods it covers, can confer no title upon an innocent third person as against the owner, or those claiming under him. See authorities cited *supra*. Upon the same principle, if a carrier delivers the goods upon a stolen bill of lading, it will not be protected from liability to the owner as for a conversion, though the bill be indorsed in blank and the delivery made in perfect good faith. If, however, a bill of lading, duly indorsed, is stolen by reason of the negligence or carelessness of the owner or his agent, the carrier in good faith delivering upon such bill of lading is not guilty of a conversion. See *Friedlander v. Railway Co.*, 130 U. S. 424, 9 Sup. Ct. 570; *Shaw v. Railroad Co.*, 101 U. S. 565; *Dows v. Bank*, 91 U. S. 618; *Pollard v. Reardon*, 13 C. C. A. 171, 65 Fed. 848; *Gurney v. Behrend*, 3 El. & Bl. 635, and 4 Am. & Eng. Enc. Law (2nd Ed.) p. 551,—where this doctrine is recognized. In such case the familiar principle would be applicable that, where one of two innocent parties must suffer by the fraud of another, the loss should fall upon him who enabled

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such third person to commit the fraud. Whether such negligence existed in a given case, of course should be determined by a jury, unless the evidence on this subject unequivocally demanded a finding one way or the other. The defendants below, however, did not deliver the goods upon a presentation of the stolen bill of lading, but had, probably a month before it was stolen by Hudgins from the Lowry Banking Company, agent of Lowe, consignor, delivered them to Gardener, Arnold & Co., for whom there was reason to believe they were ultimately intended; thus making both the defendants and Gardener, Arnold & Co., guilty of a conversion, and giving Lowe a right of action against either of them. Realizing their liability, the defendants endeavored to protect themselves by taking from Gardener, Arnold & Co. an indemnifying check against loss by reason of such unauthorized delivery. Subsequently, when Gardener, Arnold & Co. procured the stolen bill of lading from Hudgins, by paying him for the goods,—believing he was the rightful owner,—and exhibited it to the defendants, they, thinking the transaction was lawfully ended, surrendered to Gardener, Arnold & Co. the indemnifying check. Under such circumstances, the Lowry Banking Company, which had no knowledge whatever of the facts above recited, was under no duty to the defendants to so guard the possession of the bill of lading as to protect the latter from loss occasioned by their return of the check upon the production of the stolen bill. Negligence of the bank in losing possession of the bill of lading was not a matter of which the defendants had any legal right to complain. When the defendants converted Lowe's goods, and arranged a scheme for their own protection, they did so at their peril; and neither Lowe, nor his agent, the bank, each of whom was without notice of the conversion or scheme, was bound to do anything to prevent the miscarriage of defendant's plans for indemnity. The fact that Hudgins was the party to be notified of the consignment, and whose name appeared upon the bill of lading, in

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this connection, does not alter the rule. The very presence of the words, "Notify Hudgins, Atlanta, Ga.," in the bill of lading, shows that Hudgins was not intended as the consignee. If he had been, then such words were wholly unnecessary, as it is the duty of the carrier to notify the consignee of the arrival of the goods, without being requested or instructed to do so. Hutch. Carr. (2d Ed.) § 131 (b), and cases cited. When the Lowry Banking Company reimbursed Lowe for the loss of the goods, an action, in the latter's name for the former's use, was maintainable against the defendants.

3. In view of the undisputed facts disclosed by the record it follows from the foregoing that the court committed no error in refusing to allow the defendants' special plea to be filed, or in ordering the same to be stricken, or in directing a verdict for the plaintiff. Judgment affirmed; cross bill of exceptions dismissed. All concur, except COBB, J., disqualified.

Directing Verdict
—Evidence.

NOTE.

Negotiability of Bills of Lading.—A bill of lading is a symbol of ownership of goods, and is assignable though not negotiable. Chicago, B. & Q. R. Co. (Neb.) 61 Am. & Eng. R. Cas. 218.

See Garden Grove Bank v. Humeston & Shenandoah R. Co. (Iowa), 23 Am. & Eng. R. Cas. 695, note 701; Douglas v. Peoples' Bank (Ky.) 32 *Id.* 510.

The meaning, character, and effect of a bill of lading, as concerns its negotiable quality, was stated by the supreme court of the United States in Pollard v. Winton, 105 U. S. 7, in the following language: "A bill of lading is an instrument well known in commercial transaction, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without endorsement, and it is efficacious for its ordinary purposes in the hands of the holder; it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into hands of persons who have innocently paid value for it. The doctrine of *bona fide* purchasers only applies to it in a limited sense.

Note

It is an instrument of a two-fold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received there can be no valid contract to carry or deliver."

See also *Schooner Freeman v. Buckinham*, 18 How. (U. S.) 182; *Baltimore & Ohio R. Co. v. Wilkins*, 44 Md. 11; *Miller v. Hannibal & St. Joseph R. Co.*, 99 N. Y. 430, 12 Am. & Eng. R. Cas. 30.

Bills of lading are not negotiable in the same sense in which are bills of exchange or promissory notes. They stand in the place of the goods they represent, and delivery by endorsement of them transfers the right of property in the goods, but not in the contract itself, so as to enable the endorsee to maintain, at the common law, an action for it in its own name. *Baltimore & Ohio R. Co. v. Wilkins*, 44 Md. 11; *Thompson v. Dominie*, 14 Mees. & Wells, 403; *Gurney v. Behrend*, 25 Eng. Law & Eq. 136; *Blanchard v. Page*, 8 Gray (Mass.) 296.

Although a statute makes bills of lading negotiable by endorsement and delivery, it does not follow that all the consequences incident to the endorsement of bills and notes before maturity ensue, or are intended to result from such negotiations. The rule that a *bona fide* purchaser of a lost or stolen bill or note, endorsed in blank and payable to bearer, is not bound to look beyond the instrument, has no application to the case of a lost or stolen bill of lading. *Shaw v. R. Co.*, 101 U. S. 557; *citing Goodman v. Harvey*, 4 Ad. & El. 870; *Goodman v. Symonds*, 20 How. (U. S.) 343; *Murray v. Landner*, 2 Wall. (U. S.) 110; *Matthews v. Poythress*, 4 Ga. 287.

On this point the court, in *Shaw v. Railroad Co.*, *supra*, uses the following language: "The reason can have no application to the case of a lost or stolen bill of lading. The function of that instrument is entirely different from that of a bill or note. it is not a representative of money, used for transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as bank notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it,—a representative of those goods. But if the goods themselves be lost or stolen, no sale of them by the finder or thief, though a *bona fide* purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen. Why then should the sale of the symbol or mere representative of the goods have such an effect? It may be that the true owner, by his negligence or carelessness, may have put it into the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness. But the present is no such case. * * * Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by endorsement and delivery, or negotiable in the same manner as bills of

Note

exchange and promissory notes are negotiable, intended to change totally their character, put them in all respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills or notes. Some of these consequences would be very strange, if not impossible. Such as the liability of indorsers, the duty of demand *ad diem*, notice of non-delivery by the carrier, etc., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it. The law has most carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession. This protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a misappropriation had reason to believe that the person from whom he took the property had no right to it."

Bills of lading are not negotiable in the same sense in which bills of exchange or promissory notes are. *Baltimore & O. R. Co. v. Wilkens*, 44 Md. 11; *Douglas v. People's Bank*, 86 Ky. 176, 5 S. W. Rep. 420; *Batavia Bank v. New York, L. E. & W. R. Co.*, 32 Am. & Eng. R. Cas. 497, 106 N. Y. 195, 8 N. Y. S. R. 209, 7 Cent. Rep. 822, 12 N. E. Rep. 433; *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. Rep. 608; *Stone v. Wabash, St. L. & P. R. Co.*, 9 Ill. App. 48; *National Bank v. Atlanta & C. A. L. R. Co.*, 25 So. Car. 216; *Shaw v. Merchants' Nat. Bank*, 101 U. S. 557; *Lehman v. Central R. & B. Co.*, 4 Woods (U. S.) 560, 12 Fed. Rep. 595.

A bill of lading is to be regarded as a *quasi*-negotiable instrument. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. Rep. 608.

When it is said that a bill of lading is negotiable, it is only meant that its true owner may transfer it by indorsement or assignment, so as to vest the legal title in the assignee. *Douglas v. People's Bank*, 86 Ky. 176, 5 S. W. Rep. 420.

Negotiability under Statutory Provisions.—Minnesota Gen. St. 1878, ch. 124, § 17, does not put bills of lading on the same footing as bills of exchange. *National Bank v. Chicago, B. & N. R. Co.*, 44 Minn. 224, 46 N. W. Rep. 342, 560.

A statute making bills of lading negotiable by indorsement and delivery, without defining the effect of the transfer, must not be construed as making such instruments negotiable in the full sense of bills of exchange and promissory notes. *Shaw v. Merchants' Nat. Bank*, 101 U. S. 557.

Bills of lading are spoken of sometimes as negotiable, and very frequently and more accurately as *quasi*-negotiable instruments. *Voss v. Robertson*, 46 Ala. 483; *Pattison v. Culton*, 33 Ind. 240, 5 Am. Rep. 199; *Rowley v. Bigelow*, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; *Stanton v. Eager*, 16 Pick. (Mass.) 467;

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Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 27 Am. St. Rep. 861; Hale *v.* Milwaukee Dock Co. 29 Wis. 482, 9 Am. Rep. 603. And that they are, even at the common law, invested with the attributes of negotiability, in a general sense of that term, has been frequently admitted. Pollard *v.* Reardon, 65 Fed. Rep. 848; Tison *v.* Howard, 57 Ga. 410.

It has been said that "in a qualified and restricted sense a bill of lading has the attribute of negotiability." Davenport Nat. Bank *v.* Homeyer, 45 Mo. 145, 100 Am. Dec. 363.

ST. LOUIS, O. H. & C. RY. CO.

v.

FOWLER, *et al.*

(*Supreme Court of Missouri, Jan. 18, 1898.*)

Condemnation—Admission of One Joint Owner in Evidence.—In an action by a railroad company to condemn a strip across defendants' land for its right of way it was not error to permit plaintiff to introduce in evidence an assessment list made by one of the defendants, in which the land was valued by him at a certain sum, although the parties had stipulated that each defendant owned one undivided half of the land; and that half of the damages should be assessed to each.

Same—Impeachment of Testimony—Evidence.—Where the testimony of a witness taken on a former trial as to the value of the land, in which he had based his estimate upon sales made by him as agent for S. in a certain year of land in a certain addition, was read in evidence by defendant, it was not error to allow plaintiff to introduce in evidence certain deeds made by S. in the same year to lots in such addition for the purpose of impeaching the testimony read by defendant, although the deeds were not identified as the consummation of the sales to which such testimony referred.

Damages—Evidence of Sales of Other Land.*—In such action evidence of sales of other land, to be admissible, should be confined to sales of property similar in character.

Switching Facilities.—Where the tract of land sought to be condemned lies contiguous to a manufacturing city and is suitable for manufacturing purposes the jury in estimating damages may consider the value of switching facilities to the remainder of the land, though there was no evidence of an offer or agreement by plaintiff to permit or provide switch connections with its track.

Same—Special Benefits.—A general benefit is an advantage "conferred by the public work upon all the property within range of its utility." A special benefit is "an advantage conferred upon a tract by reason of the maintenance of a public work upon it."

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Same—Instructions.—Plaintiff in such action cannot complain of an instruction which if standing alone might be open to the criticism that it permits the jury, in estimating the damages, to consider the general benefits to the land arising from the construction and operation of the road, if the jury were told in other instructions to consider special benefits only and such benefits were properly defined.

Damages—Interest.*—Where the damages assessed by the commissioners in condemnation proceedings are paid in to court by the railroad company, defendant is entitled to withdraw and use such money, and plaintiff cannot thereafter be required to pay interest on such amount.

Stare Decisis—Application of Rule.—The maxim of *stare decisis* does not apply to decisions on points unless such points arise and are decided in causes.

Value—Expert Evidence—Not Binding on Jury.—Expert Evidence as to the value of land condemned and the damage sustained by its owner is for the consideration of the jury, but is not binding upon them.

APPEAL by defendants from St. Louis Circuit Court. *Affirmed.*

This is a proceeding by the plaintiff, a railway company, to condemn, for right of way, a strip of land through a 24-acre tract belonging to defendants, situate within the limits of St. Louis. The proceedings were commenced in 1886. Commissioners were appointed, who awarded to defendants \$2,580 damages.

Case Stated.

On exceptions thereto filed in the circuit court, a trial by jury was had, and the damages were assessed at \$11,541.20. On appeal to this court the judgment was reversed. On a retrial by a jury the damages were assessed at \$3,850, and defendants appeal.

During the trial the following stipulation was made by the parties: "It is agreed that at the date of the institution of this suit, as well as on November 22, 1886, the property of the present defendants now in question was owned by the original defendants, Isaac L. Rothan and Rosa Goldsmith, as tenants in common, share and share alike; that is to say, that said Isaac L. Rothan and Rosa Goldsmith each owned an undivided one-half of said property. It is further agreed that one half of the total damages to said land shall be

*See note at end of case.

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assessed in favor of said Isaac L. Rothan, and the other half in favor of Adolph Loth, executor of Rosa Goldsmith.'" Evidence was offered by defendants tending to prove the damages sustained, and by plaintiff tending to prove that the remainder of the tract would be specially benefited by the railroad. Exceptions were saved to the admission and rejection of evidence, and to the giving and refusing of instructions. The questions for decision will be stated in the opinion.

David Goldsmith for appellants.

Martin L. Clardy and *Henry G. Herbel*, for respondent.

MACFARLANE, J. (after stating the facts). 1. It is first insisted that the court committed error in permitting plaintiff to introduce in evidence an assessment list made by defendant Rothan on July 11, 1887, in which he values the land at \$10,000. It appears that the court admitted the evidence as an admission of Rothan, and as affecting his interest alone. Counsel for the other defendant does not controvert the well-recognized rule of evidence that admissions and declarations of a party, made against his interest, may be given in evidence against him, and agrees that, if Rothan was the sole defendant, there would have been no error in the admission of the evidence; but it is argued that the admission of one tenant in common is not receivable as evidence against his co-tenant, though both are parties to the same suit, and the evidence, when admitted, necessarily affected the rights of the other defendant, for the reason that the parties had stipulated that the jury should assess the same amount of damages to each of the co-tenants. We do not consider it necessary to determine the question whether the admissions of Rothan were receivable as evidence against his co-tenant. There can be no doubt that they were competent as evidence against the party making them, and we do not think such effect should be given to the stipulation as would prevent the introduction of any evidence,

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tending to reduce the damage of either party, which would be otherwise competent. Without the stipulation, the evidence was admissible against Rothan. When the defendants agreed that the damage to each of them should be the same, they agreed, in effect, that the jury should disregard the respective interests of the parties, and find the damage done to the land, and divide it between the defendants, thereby making the rights of the co-tenants joint, and, for the purposes of the suit, inseparable. It is well-settled law, at least in this state, that if parties prove a joint interest in the matter in suit, whether as plaintiffs or defendants an admission by one is, in general, evidence against all. *Armstrong v. Farrar*, 8 Mo. 629; *Hurst v. Robinson*, 13 Mo. 83. The legal effect of the stipulation is that each party waived all objection to evidence which was admissible against the other. The parties placed themselves in the position of joint owners in respect to the damages to be assessed, and, on the trial, should not be permitted to shift their position, and claim as tenants in common, in order to prevent the introduction of evidence which would be competent if the ownership was joint. We do not think defendants can complain, though the admissions of Rothan, in the absence of the stipulation, would not have been admissible against the other defendant.

2. The testimony of a witness taken on a former trial was read in evidence by defendants. He testified to the value of the land, and based his estimate largely upon sales made by him as agent for one August Stein, in 1886 and 1887, of lots in Fairmount addition. The witness was not present at the trial. In rebuttal, plaintiff read in evidence three deeds made by August Stein, in 1887, to lots in said addition, by which it appeared that the consideration was much less than that given from memory by the witness. Defendants complain of the admission of these deeds, upon the ground that they were not properly identified as the consummation of the sales to which the witness referred. There is no

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doubt that the plaintiff had the right to prove that the consideration for the sales of land upon which the witness based his estimate of the value was less than that testified to by him. It would tend to impeach his estimate of value, as well as to contradict his testimony. Plaintiff makes no claim that the deeds were admissible for any other purpose. The question, then, is, was a sufficient foundation laid for admission of this impeaching testimony? The witness testified that the sales of lots in Fairmount addition were made by August Stein, in 1886 and 1887. The deed shows the conveyance of lots in the same addition by August Stein in the year 1887. The witness could not state the names of the vendees, but gave it as his recollection that four or five sales were made by Stein. It seems to us that a foundation for the admission of the deeds could not, in the circumstances, have been more completely laid. If five sales were made by Stein, three of them must have been executed by the deeds offered in evidence. The vendor and grantor were the same; the land was in the same addition; and the deeds were made within the time specified by the witness. We think it sufficiently appears that the sales referred to by the witness were the same as those evidenced by the deeds. The deeds were admissible to show the probative value of the opinion of the witness as well as to contradict him.

3. A witness called by plaintiff testified to the value of defendants' land, and to the damages thereto caused by the location of the road across it. His estimate of the value was based upon sales of two similar tracts of land near by. It was shown that one of these tracts had been platted into lots, blocks and streets; that the streets had been graded, sidewalks laid, sewers constructed, trees planted, and other improvements made. On cross-examination the witness was asked by defendants' counsel whether some of these lots had not sold for as much as \$25 per front foot. This evidence was excluded by the court, on objection of counsel for the plaintiff. We think the learned circuit judge ruled

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correctly. Evidence of sales of other land, to be admissible, should be confined to sales of property similar in character. *Railway Co. v. Clark*, 121 Mo. 185, 25 S. W. 192, 906. Sales of small residence or business lots on improved streets would give the jury no assistance in estimating the value of a tract of 24 acres of unimproved land.

By the first instruction given at request of plaintiff, the jury were told that if the remaining parts of the tract were suitable for manufacturing purposes, and their value was enhanced by reason of "switching facilities or otherwise, to an extent equal to or beyond the amount they were damaged for subdivision into residence purposes," then their verdict would, "be limited to the value, on the 22d day of November, 1886, of the strip of land actually appropriated by the plaintiff for its right of way." In his objection to this instruction, counsel insists that there was no evidence of any obligation on the part of the railroad company to allow to the owners of the remaining land the right to connect switch tracks to its railroad, or to give such owners switching facilities, and for that reason the instruction is erroneous. On the trial defendants insisted that the remaining parts of the land would be greatly damaged for residence purposes, and plaintiff insisted that, while that might be so, the facilities for transportation afforded by the railroad increased its value for manufacturing purposes, and this would result in part as the effect of facilities for running switch tracks into the road without being required to cross public streets. Much of the evidence on the trial was directed to these questions. There was no evidence of an offer or agreement by plaintiff to permit or provide switch connections with its track. The question, then, is whether "switching facilities," as used in the evidence and instructions, is a matter of special benefit, which should have been considered by the jury in reduction of the damage to the land remaining after the appropriation. The following instruction for estimating the

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damages of a landowner in condemnation proceedings has received the approval of this court in a number of cases, and is the rule generally adopted in other jurisdictions : "In estimating the damages to the land, the jury will consider the quantity and value of the land taken by the railway company for right of way and the damage to the whole tract by reason of the road running through it, and deduct from these amounts, the benefits, if any, peculiar to said tract of land arising from running the road through the same. And by peculiar benefit to the land is meant such benefits as that land derives from the location of the road through it as are not common to the other land in the same neighborhood." Railroad Co. *v.* Ridge, 57 Mo. 601; Lee *v.* Railroad Co. 53 Mo. 179; Railway Co. *v.* Waldo, 70 Mo. 630; Hickman *v.* Kansas City, 120 Mo. 121, 25 S. W. 225, and cases cited. It is also held that the appropriation is complete when the damages assessed by the commissioner have been paid to the landowner, or into court for him, and the condemning company has taken possession of the land. The value of the land is to be estimated as of the date of the appropriation. The proceedings subsequent to the appropriation are for ascertaining the damages sustained in consequence of the "establishment, erection, and maintenance of the railroad." Railway Co. *v.* Clark, 121 Mo. 195, 25 S. W. 192, 906; Rev. St. 1889, §§ 2734, 2738. In the case cited, it was held, further, that the damages to the land remaining, after the appropriation, should be estimated in view of the plans the railroad company had adopted in the construction of its road and the condition in which the remaining land was left. These estimates of damages, if the road has been constructed and put in operation, should be made on the basis of the condition of the remaining land at the date of the trial. Applying these principles, it was held that a railway company, in a proceeding for the assessment of damages, conducted after the appropriation, may at the trial, and for the purpose of reducing the damages, agree to construct open crossings to aid the owner to

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use, as one tract, the land remaining on either side of the road.

The tract of land in question in this case lies contiguous to a great manufacturing city. The railroad is but a few miles in length, and was intended to secure business from the suburbs of the city. The tract was so near to the city as to be valuable for residence and manufacturing purposes. Facilities for transportation are essential to successful manufacturing enterprises, and it is evident that land suitable for such purposes might be greatly enhanced in value on account of such facilities. At the time the land was appropriated and the railroad was built, the company was under no special obligation to grant to the owners of land contiguous to it such facilities for transportation as would induce manufacturers to establish their factories upon it. But considering the purposes for which the road was constructed, the locality of the land, and the interests of the company from a business standpoint, we could not say that, in estimating the benefits to the land, the jury should not consider the special advantages for transportation the road would afford to the owners of the remaining land. What the effect on the value of the land would be the jury could determine. But after the appropriation of the land, and before the trial, an act of the general assembly was passed and approved, which is now section 2623 of the Revised Statutes. The section is as follows: "Any person or corporation owning or operating any coal, lead, iron or zinc mine, or other ore, or any saw mill or other industry, whenever in the opinion of the railroad commissioners the amount of business is sufficient to justify the same, near or within a reasonable distance of any railroad track, may, at their or its expense, build and keep in repair a switch leading from such railroad to such mine, saw mill or other industry; such railroad company shall be required to furnish the switch stand and frog and other necessary material for making connection with its track, and shall make such connection, the party owning such mine, saw mill or other industry

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to pay the actual cost thereof; and if any railroad company, after demand is made, shall refuse to furnish said material for making said connection and put the same in place, or after the building of such switch shall fail or refuse to operate the same, such railroad company failing or refusing shall forfeit and pay to the party or corporation aggrieved the sum of five hundred dollars for each and every such offense, together with a reasonable attorney's fee, to be recovered by civil action in any court of competent jurisdiction; and every day of such refusal on the part of any railroad company to operate such switch aforesaid, after demand is so made, shall be deemed a separate offense." At the time of the trial, under the provisions of this statute, the owner of the remaining land, who should establish an industry thereon, in which the amount of business is sufficient to justify the same, has the right to switch connections, which the company is bound to provide and operate. The duty imposed upon the company by the statute is as obligatory upon it as a personal covenant to furnish such facilities would be. Following the rule adopted in the Clark Case, *supra*, by the court in bank, the damages and benefits to the remaining tract should be estimated, in view of the condition in which the land is left, the manner in which the road is to be used, and the rights of the parties as they exist at the time of the trial. The same rule has been approved by the supreme court of Illinois in Hayes v. Railroad Co., 54 Ill. 375, where the court say: "It is claimed that evidence in regard to the location of the depot was not relevant, because it was not determined upon at the time of the taking of the defendants' land, in August, 1869, and that only the state of facts then existing could be considered; that is, the time in reference to which the value of the land taken is to be estimated. But when damages and benefits come to be estimated, by reason of the construction and use of the road, the manner in which the road is to be constructed and used is important. The location of a depot pertains to its construction and use, and if that particular, in the

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manner of the construction and use of the road, has not been determined upon until the trial, we think it may then be considered upon the question of benefits and damages." See, also, *Railroad Co. v. Fletcher*, 128 Ill. 626, 21 N. E. 577; *Packard v. Railroad Co.*, 54 N. J. Law, 553, 25 Atl. 506; *McGregor v. Gas Co.* (Pa. Sup.) 21 Atl. 13.

5. But defendants insist that the benefits derived from switching privileges are not peculiar to their land, but are common to all land located on or near the line of the road, and therefore should not have been taken into account for the purpose of showing the real injury done to the residue of the land. It is probably true that lands adjacent to the road, which are not touched or damaged by the railroad, have the same advantage of switching facilities as is secured to the residue of the land of defendants after a portion has been appropriated. But we do not think that circumstance makes the benefits to defendants' land general, within the meaning of the law which excludes general benefits from consideration in estimating the damage. A general benefit is an advantage "conferred by the public work upon all property within range of its utility." A special benefit is "an advantage conferred upon a tract by reason of the maintenance of a public work upon it." *Rand. Em. Dom.* §§ 269, 270. As defined by Lewis, "general benefits consist of an increase of the value of land common to the neighborhood or community generally, arising from the supposed advantages, which will accrue to the community by reason of the work or improvement in question." *Lewis, Em. Dom.* § 471. If defendants' land receives benefits, by reason of switching facilities, greater in degree than the advantages all the land in the community receives from the construction of the road, then it could be a matter of no importance that other land which receives no damage is also specially benefited. The widening of a street, by taking land from one side only, benefits the property on the other side, though the owner bears no part of the

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damage caused by the improvement ; yet the owner of the land taken may be charged with the special benefits to his remaining land. *Abbott v. Cottage City*, 143 Mass. 521, 10 N. E. 325 ; *Allen v. Charleston*, 109 Mass. 246. Switching privileges, such as are required by the statute to be provided, are only of advantage to those who own land "near or within a reasonable distance of the railroad." The benefits are not common to all the land in the community generally, but are special to the land which is so situated that they can be used. We are of the opinion, after a careful reconsideration of the questions involved in the criticised instruction, that the jury had the right, in making its estimate of damage, to take into consideration the benefits that accrued to the land on account of switching facilities, required by the statute to be provided, and that the law was correctly given to the jury.

6. The second instruction given for plaintiff told the jury that "unless they find from the evidence that defendants have sustained damages by reason of the appropriation of a part of what is known as the 'Rothan property,' beyond the value of the land actually taken by the railroad company, their verdict should be for the value of the property so taken, as shown by the evidence, and no more." Appellants complain that the instruction authorizes a comparison of the value of the land before and after the railroad was located thereon, and leaves the jury to find the difference in such value as the amount of damages to be assessed, without regard to the general appreciation of the value in common with other lands in the community ; in other words, that it leaves the jury, in estimating the damages, to take into consideration the general benefits to the land on account of the construction and operation of the road. The instruction, if standing alone, might be open to the criticism made against it ; but by other instructions the jury is distinctly told that no deductions should be made on account of general benefits. On the question of the consideration of benefits, the court, of its own motion, gave this

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instruction: "The jury should first ascertain and assess the value on November 22, 1886, of the strip of land taken by the plaintiff for its right of way through said tract; and if the jury find from the evidence that the value of the remainder of said tract—that is, of either or both portions of said tract on either side of said railroad—was on November 22, 1886, diminished by the location of said railroad through it, then the jury must, in addition to the aid value of said right of way, further allow the defendants the amount of any and all of such diminution in value. And if the jury should also find from the evidence that there were peculiar benefits to said land by reason of the location of said railroad through it, and that such peculiar benefits enhanced the value of said land on November 22, 1886, then such peculiar benefits must be deducted from such damages; but by peculiar benefits are meant only such benefits if there were any, as said tract derived from the location of said railroad through it, and as were not common to other lands in the same neighborhood which do not lie or abut on said railroad; and no deduction whatsoever should be made for any benefits, if there were any, which were derived from said location of said railroad, not only by said tract of land, but also by other land in the neighborhood which does not lie or abut upon said railroad." With these specific instructions, the jury could not have been misled by the general direction contained in the one criticised.

7. As before stated, the damages were assessed by the commissioners at \$2,580. This amount was paid into court for the landowners, and the railroad company at once took possession of the land, and constructed its road upon it. Defendants filed exceptions to the award of the commissioners, and on a trial in court the jury assessed the damages at \$11,541.20, and judgment was rendered in favor of defendants for that amount. From this judgment, plaintiff appealed. On that appeal the court held that defendants had the right to withdraw and use the money that had been paid into court for them, and, as

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a consequence, the company should not thereafter be required to pay interest on that amount. *Railway Co. v. Fowler*, 113 Mo. 473, 20 S. W. 1069. On a retrial of this case, the court instructed the jury (in respect to the allowance of interest) in accordance with the ruling of the court on the former appeal. It had been previously held by this court that the provision of the statute (section 2736) requiring that the amount of damages awarded by the commissioners should be paid to the clerk of the court for the landowner, as a condition to be performed by the condemning company, before possession of the land could be taken, contemplated a mere deposit with the clerk, "there to await the final determination of the suit." *St. Louis & S. F. Ry. Co. v. Evans & Howard Firebrick Co.*, 85 Mo. 328. This construction of the constitution and statute remained undisturbed from 1884 until the former decision in this case in 1892. It appears that the amount awarded by the commissioners in this case was not withdrawn by the defendants, but remained on deposit to await the final determination of the proceeding. Defendants now insist that, in failing to withdraw the deposit, they acted upon the construction given the constitution in the *Howard-Evans Case*, upon which they had the right to rely, and they should not be made to suffer the loss of interest on the deposits (to which they would have been entitled) by reason of the subsequent change of judicial construction. The force of the argument of counsel must be conceded. The general rule undoubtedly is that "a judicial construction of a statute becomes a part of it, and, as to rights which accrue afterwards, it should be adhered to for the protection of those rights. To divest them by a change of construction is to legislate retroactively." *Suth. St. Const.* § 319. The true rule is said to be "to give a change of judicial construction in respect to a statute the same operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive." *Dou-*

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glass v. Pike Co., 101 U. S. 677. See, also, Farrior v. Security Co., 92 Ala. 178, 9 South. 532, and cases cited. But in the Howard-Evans Case the statute was not construed in respect to the right of the landowner to interest on the money paid into court. That question was not before the court, and was not directly passed upon. The only question really involved and decided was whether or not an appeal, by the condemning company, operated as a supersedeas to prevent the payment to the landowner of the money deposited in court. We do not think the rule above stated in respect to the effect of a judicial construction of a statute, upon rights acquired under it, should be applied to constructions that can, at most, be implied from something that was actually decided. In order to give effect to the rule, the construction of the statute should have been directly involved in the case decided. "The maxim of *stare decisis* applies only to decisions on points arising and decided in causes." Suth. St. Const. § 320. Since the former decision in this case, it has been held that, if the landowner does not withdraw the deposit, he is entitled to the interest the money actually earns while in the custody of the court. Railroad Co. v. Clark, 121 Mo. 187, 25 S. W. 192, 906; Snyder v. Cowan, 120 Mo. 389, 25 S. W. 382; Railroad Co. v. Eubanks, 130 Mo. 272, 32 S. W. 658. These decisions are inconsistent with the position of defendants in this case; for, if the landowner was entitled to recover from the railway Company interest on the award of the commissioners while the money was on deposit, he could not be entitled also to the interest earned on the money deposited. The assumption of counsel that in the Evans-Howard Case the statute was so construed as to give the landowner interest on the money deposited is not correct. It is neither so decided expressly nor by necessary implication. According to that decision, the money is deposited, not as compensation to the landowner, but as security that compensation will be paid when ascertained in subsequent proceedings. It cannot be implied from that decision that the condemn-

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ing company should pay interest on its own money deposited merely as security. We are of the opinion that the court properly instructed the jury on the question of the allowance of interest.

8. Defendants object to instruction 3, which is as follows: "(3) The jury are instructed that in regard to the evidence before you of experts and others concerning the value of the land taken by the railroad company, and the actual damage, if any, done to the defendants' land, you are not bound by the testimony of such witnesses, but you may apply your own judgment and knowledge as to such values and damages in arriving at your verdict in connection with the testimony offered in this case at the trial." Instructions substantially the same were approved in the cases of *Kansas City v. Butterfield*, 89 Mo. 648, 1 S. W. 831; *St. Louis v. Ranken*, 95 Mo. 192, 8 S. W. 249; *Hull v. City of St. Louis* (Mo. Sup.) 40 S. W. 89. We see no necessity for reconsidering the question.

Same—Expert
Evidence—Not
Binding on Jury.

After a rehearing and full consideration, we are of the opinion that the case was fairly tried, according to well-settled principles, and that the judgment should be affirmed, which is ordered.

BARCLAY, C. J., and ROBINSON and BRACE, JJ.,
concur.

NOTES.

Admissibility of Evidence of Sales of Similar Property.

Admissible.—See *Davis v. Northwestern El. Ry. Co.*, (Ill.) 9 Am. & Eng. R. Cas. N. S., 452. Evidence of the sales of other similar property in the same neighborhood, at or about the same time, tends to show the fair market value of the property sought to be condemned; and such sales, when made in a free and open market, where a fair opportunity for competition has existed, become material and important factors in determining the value of peculiar property. But to have that tendency they must have been under circumstances where they are not compulsory, and where the vendor is not compelled to sell, at all events, but is at liberty to invite competition among those desiring to purchase. *Peoria G. L. & C. Co. v. Peoria Terminal R. Co.*, 146 Ill. 372, 34 N. E. Rep. 550. *St. Louis, K. & N. W. R. Co. v. Clark*, 57 Am. & Eng. R. Cas. 542, 121

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Mo. 169, 25 S. W. Rep. 192. *Seattle & M. R. Co. v. Gilchrist*, 4 Wash. 509, 30 Pac. Rep. 738.

But it is incumbent on the party offering such proof to show that the lands so sold were similar in locality and character to the land in question. *O'Hare v. Chicago, M. & N. R. Co.*, 139 Ill. 151, 28 N. E. Rep. 923.

In a proceeding to condemn a lot in a city, evidence of the price per foot an adjoining tract had been sold for, and the price per foot at which other lots had been offered for sale, is competent if offered by the company as evidence in chief, but is not after defendant has closed. *Chicago & W. I. R. Co. v. Maroney*, 5 Am. & Eng. R. Cas. 360, 95 Ill. 179.

Evidence in regard to sales of prairie land one mile distant from the land sought to be condemned may be received, as tending in some measure to show the value of the land involved, when there is no evidence of any actual present market value, nor of sales of like property nearer. *Concordia Cemetery Assoc. v. Minnesota & N. W. R. Co.*, 30 Am. & Eng. R. Cas. 363, 121 Ill. 199, 12 N. E. Rep. 536, 10 West. Rep. 573.

Where it is sought to show the value of the property condemned by showing what other property has sold for, in order to make such evidence admissible it must appear (1) that no other evidence can be had; (2) that the property sold was similar to the property condemned; and (3) that the sales were not remote in point of time from the date of the award. *Stinson v. Chicago, St. P. & M. R. Co.*, 27 Minn. 284, 6 N. W. Rep. 784.

To show the value of the land taken, evidence is admissible of the price obtained at an administrator's sale of an undivided part of the land. *March v. Portsmouth & C. R. Co.*, 19 N. H. 372.

Inadmissible.—Evidence of the price paid or the amount received for land in the neighborhood in particular instances is inadmissible; the only proper test is the opinion of witnesses as to the value of the land taken, in view of its location and productiveness, its market value, or the general selling price of land in the neighborhood. *East Pa. R. Co. v. Hiester*, 40 Pa. St. 53. *Pennsylvania & N. Y. R. & C. Co. v. Bunnell*, 81 Pa. St. 414, 16 Am. Ry. Rep. 1. *Pittsburgh, V. & C. R. Co. v. Vance*, 115 Pa. St. 325, 8 Atl. Rep. 764.

Such evidence would introduce collateral issues, and is not admissible in such a proceeding. *Pittsburgh & W. R. Co. v. Patterson*, 107 Pa. St. 461.

An instruction by the trial court, therefore, that where there have been no public sales of adjoining land the jury may ascertain the market value of the land in controversy from the knowledge and judgment of men who are acquainted with the property, and who by their experience can give a fair and impartial opinion as to the value of the property, is not erroneous. *Curtin v. Nittany Valley R. Co.*, 44 Am. & Eng. R. Cas. 130, 135 Pa. St. 20, 19 Atl. Rep. 740.

Evidence of the price at which other lots, not shown to be similar to the ones in question, were sold about the time the condemnation proceedings were begun, is not admissible for the purpose of establishing a criterion by which the jury might form a judgment as to the value of the lots under consideration. *Cummins v. Des Moines & St. L. R. Co.*, 17 Am. & Eng. R. Cas. 86, 63 Iowa 397, 19 N. W. Rep. 268. *Hollingsworth v. Des Moines & St. L. R. Co.*, 17 Am. & Eng. R. Cas. 113, 63 Iowa 443, 19 N. W. Rep. 325.

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Upon a trial for land damages the question was as to the value of the land on April 18, and how much less it was worth by reason of constructing a railroad through it. *Held*, that evidence offered by the railroad company as to what the owner sold a lot for on the 16th of May was properly excluded. *Sheldon v. Minneapolis & St. L. R. Co.*, 29 Minn. 318, 13 N. W. Rep. 134.

Admission Discretionary.—It is very much within the discretion of the presiding officer to determine whether actual sales of other lands, which are offered to be proved, were sufficiently recent, and whether the lands were sufficiently like that in controversy, to make the evidence admissible. *Shattuck v. Stoneham Branch R. Co.*, 6 Allen (Mass.) 115.

A witness who has been examined on behalf of the owners of land across which a railroad has been built, to show that such land was suitable to be platted into village lots and its probable value when so platted, may be cross-examined in regard to sales of lots in the vicinity, though some of such sales were made four or five years previously. The limit within which evidence of such sales may be given is very much in the discretion of the trial judge. *Watson v. Milwaukee & M. R. Co.*, 10 Am. & Eng. R. Cas. 168, 57 Wis. 332, 15 N. W. Rep. 468.

But to be of value such sales should be of lands similar in character, location, and value to the land in question, and should not be too remote in time. *Washburn v. Milwaukee & L. W. R. Co.*, 20 Am. & Eng. R. Cas. 225, 59 Wis. 364, 18 N. W. Rep. 328.

Interest on Damages.—See *Dickson et al. v. Epling et al.*, (Ill.) 9 Am. & Eng. R. Cas., N. S., 403, and note, p. 409.

STATE (WEST JERSEY & S. R. CO., PROSECUTOR.)

v.

OCEAN CITY R. CO.

(*Supreme Court of New Jersey, April 2, 1898.*)

Condemnation—Appointment of Commissioners—Certiorari—Authority of Supreme Court.—In proceedings to condemn lands under the general railroad law, the justice of the supreme court is vested with an express power, coupled with such implied authority only as is necessary for its execution. When the application and notice conform to the statute, the appointment of commissioners is a matter of course.

Same—Prima Facie Compliance with Statute.—The judicial officer must decide whether there is *prima facie* a compliance with the statute. Beyond this he has no jurisdiction over the parties on the subject.

(Syllabus by the Court.)

CERTIORARI by the West Jersey & Seashore Railroad Company against the Ocean City Railroad Company. *Dismissed.*

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Argued February term, 1898, before GARRISON and LIPPINCOTT, JJ.

J. H. Gaskill, for prosecutor.

R. H. McCarter, for defendant.

GARRISON, J. This certiorari brings up the order made by a justice of this court appointing commissioners to assess the damages to be paid to the prosecutor for crossing and taking certain of its lands.

The proceeding is under the general railroad law (2 Gen. St. p. 2641). It was objected on the part of the landowner, the West Jersey & Seashore Railroad Company, that the appointment should not be made, because the land described in the notice was a public highway, along which no lawful authority to construct a railroad existed; also, because the applicant had no municipal authority to occupy longitudinally the said highway, and that no effort had been made to purchase the land or rights of the prosecutor.

This last point was not borne out by the proofs, and is not made a contention in the brief of counsel. The other objections rest upon a misconception of the effect of the proceeding, and of the extent of the jurisdiction involved. The proceeding at its completion simply names a sum of money as the equivalent of what the prosecutor will lose if the applicant takes what is described in his notice. It does not say that he may take it. It affirms nothing. It simply assesses damages for a hypothetical injury.

The entire subject appears to be settled by the reasoning of *Beasley, C. J.*, in *Delaware, L. & W. R. Co. v. Hudson Tunnel R. Co.*, 38 N. J. Law, 17, and in the opinion of the court of errors in the same cause. *Morris & E. R. Co. v. Hudson Tunnel R. Co.*, Id. 548. To the same effect are *National Ry. Co. v. Easton & A. R. Co.*, 36 N. J. Law, 181, and *Pennsylvania R. Co. v. National Docks & N. J. J. C. Ry. Co.*, 57 N. J. Law, 86, 30 Atl. 183.

The writ will be dismissed, with costs.

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CHICAGO, B. & Q. R. Co.

v.

STATE OF NEBRASKA *ex rel.* CITY OF OMAHA.

(*U. S. Supreme Court, April 11, 1898.*)

Contracts between Railroads and Cities—Impairment of Contract—Obligations—Subsequent Acts.—Where the parties to a contract are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject-matter of the contract is one which affects the safety and welfare of the public, the principle that the obligations of contracts cannot be impaired by subsequent legislation is not applicable.

Same—Repairing Viaduct.—It is competent for a state to supervise, control and change agreements between a city and a railroad company as to the construction and maintenance of a viaduct at an important crossing, within a populous city, saving any rights previously vested.

Same—Apportionment of Burden.—An act is not unconstitutional because it delegates to the city council the authority to apportion the burden of repairing such viaduct among the several railroad companies using the viaduct.

Same—Passage of Ordinance—Railroad's Right to Notice.—It was not necessary for the city to notify the railroad companies before passing an ordinance requiring them to construct such viaduct.

Validity of Statutes—Federal Jurisdiction.—It is not within the province of the supreme court of the United States to declare void a state statute merely because it may seem doubtful in policy and to inflict hardships in particular instances.

ERROR by defendant to the Supreme Court of the State of Nebraska. *Affirmed.*

The state of Nebraska, on the relation of the city of Omaha, filed its petition in the district court of the Fourth Judicial district of Nebraska on January 19, 1895, asking judgment for the issuing of a writ of *mandamus* requiring the Chicago, Burlington & Quincy Railroad Company to repair, in accordance with the directions of a city ordinance enacted under certain statutes of the state legislature, the south one-third of the viaduct at Eleventh street in the city of Omaha, a structure forming a part of that

Case Stated.

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street, and spanning a number of railroad tracks, one of which was owned and used by the said company, the others being owned by the Union Pacific Railway Company, and used by it and two other companies. The defendant filed its answer on March 6, 1895, alleging therein, among other things, that the legislature of Nebraska had no power to impose upon the defendant the duty of maintaining or repairing the viaduct, for the reason that to do so would be in violation of the obligations of the contract, hereinafter described, under which the viaduct was constructed, and contrary to the provisions of the constitution of the United States. At the trial of the case, evidence was adduced by both parties ; but there was substantially no dispute respecting the facts, the controversy having relation only to the validity, interpretation, and effect of legislative enactments, and to the validity of city ordinances. On May 1, 1895, the court entered judgment in favor of the city, and directed that a peremptory writ of mandamus issue to the defendant company, commanding and requiring it to make the repairs in question, the same to be commenced immediately, and carried forward without unnecessary delay. The defendant, having been denied a new trial, took the case on writ of error to the supreme court of the state, and, upon the affirmance by that court of the judgment of the said district court (66 N. W. 624,), sued out a writ of error bringing the case here, alleging in its assignment of errors that the statutes of Nebraska, which were held by the supreme court of that state to be valid, and to require the company to make the said repairs, were repugnant to the constitution of the United States, because they impaired the obligation of contracts, abridged the company's privileges and immunities, deprived it of its property without due process of law, and denied to it the equal protection of the laws, and that the judgment enforcing those statutes was therefore erroneous.

The facts presented are substantially as follows :

The defendant company is a corporation of the state of Illinois, has complied with the laws of the state of

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Nebraska, so as to be authorized to do business as a railroad company in that state, and maintains a general office therein, and is the grantee of and successor to the Burlington & Missouri River Railroad Company in Nebraska, a corporation of the state of Nebraska, which company was the lessee of the Omaha & Southwestern Railroad Company, a corporation organized in the year 1869, under chapter 25, Rev. St. Neb. 1856.

That chapter contains, among other provisions, the following :

"Sec. 83. If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley, or public way or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authorities owning or having charge thereof, and the railroad company, to agree upon the manner, and upon the terms and conditions upon which the same may be used or occupied; and if said parties shall be unable to agree thereon, and it shall be necessary, in the judgment of the directors of such railroad company, to use or occupy such road, street, alley, or other public way or ground, such company may appropriate so much of the same as may be necessary for the purposes of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals by the eighty-first section of this chapter. * * *"

"Sec. 86. Any railroad company may construct and carry their railroad across, over or under any road, railroad, canal, stream or watercourse, when it may be necessary for the construction of the same; and in such cases said corporation shall so construct their railroad crossing as not necessarily to impede the travel, transportation or navigation upon the road, railroad, canal, stream or watercourse so crossed. * * *"

"Sec. 103. Every railroad corporation shall maintain and keep in good repair all bridges and their abutments which such corporation shall construct, for the purpose of enabling their road to pass over or under any turnpike, road, canal, watercourse or other way."

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On May 14, 1884, an ordinance of the city of Omaha was approved, granting to the Omaha & Southwestern Railroad Company the right of way through portions of certain streets and alleys, including Eleventh street, in that city. The ordinance was in part as follows: ‘

“Said Omaha and Southwestern Railroad Company shall have the right to construct, maintain and operate a line of railroad along, upon, through and across said portions of said streets and alleys as a part of its line: provided, that said railroad track and tracks are constructed so as to conform to the grade of said street as near as may be, and so as to interfere as little as possible with the travel along and upon said streets: and, provided, that nothing herein contained shall be construed as interfering with the right of any property owner to recover from said company any damages resulting to private property by reason of the construction of said railroad, and nothing herein granted shall authorize any interference with the tracks of the Union Pacific Railway Company now laid and operated by said Union Pacific Railway Company in any portions of the streets and alleys herein named and enumerated.”

On March 4, 1885, an act of the legislature of Nebraska was approved, entitled “An act to provide for viaducts, bridges and tunnels in certain cases, in cities of the first class,” whereby it was provided that the mayor and city council of any city of the first class should have power, whenever they deemed any such improvement necessary for the safety and convenience of the public, to engage and aid in the construction of any viaduct or bridge over or tunnel under any railroad track or tracks, switch or switches, in such cities, when such tracks or switches crossed or occupied any street, alley, or highway thereof, in the manner and extent provided for in the act, and should have the power to pass any and all ordinances, not in conflict with the act, that might be necessary or proper for the construction, maintenance, and protection of the said works.

By virtue of this act, the city of Omaha, which was

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then a city of the first class, and the Union Pacific Railway Company and the Omaha & Southwestern Railroad Company, the lessor of the defendant company, executed an agreement in writing February 1, 1886, providing among other things, for the construction of a viaduct on Eleventh street across the tracks of those companies. The agreement was in part as follows:

“That the said parties of the second part [the Union Pacific Railway Company and the Omaha & Southwestern Railroad Company], in pursuance of the provisions of an act of the legislature of the state of Nebraska, entitled ‘An act to provide for viaducts, bridges and tunnels in certain cases, in cities of the first class,’ do hereby assume and agree to pay, as may be required by the mayor and city council of said city, three-fifths of the entire cost of constructing a viaduct along Eleventh street, and three-fifths of the damages to abutting property on account of the construction of such viaduct not otherwise provided for by waivers or private contributions, such entire cost and damages not to exceed the sum of ninety thousand dollars (\$90,000), the amount so assumed and agreed to be paid being three-fifths of the entire cost and damages, to be proportioned between said parties of the second part as follows: Three-fourths thereof to be paid by said Union Pacific Railway Company, and one-fourth thereof to be paid by said Omaha and Southwestern Railroad Company. * * * The plans and specifications for said viaducts, before contracts for the construction thereof are entered into, shall be submitted to and approved by said parties of the second part, and should plans and specifications be adopted by said parties of the first part and approved by said party of the second part, which shall increase the said cost and damages beyond the amount herein limited, then the said parties of the second part are to pay their respective proportions of said increased cost and damages, in the same manner and according to the same division as hereinbefore agreed.”

Under the provisions of this agreement, the viaduct was built, and in 1887 it was opened to the use of the

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public. On March 30th of that year, a short time before the viaduct was completed, an act of the legislature was approved, entitled "An act to incorporate metropolitan cities, defining, regulating and prescribing their duties, powers and government." The act, which took effect from its passage, declared that all cities in the state of Nebraska then having a population of 60,000 inhabitants or more, according to the state census of 1885, and all cities in the state which should hereafter have a population of 60,000 inhabitants or more, should be considered and known as cities of the metropolitan class, and should be governed by the provisions of the act. Laws Neb. 1887, c. 10. At that time the city of Omaha, according to the state census of 1885, had a population in excess of the said number, and under the act was incorporated a city of the metropolitan class. Section 48 of this act, as amended by an act approved in 1893 (chapter 3, Laws Neb. 1893), is as follows:

"Sec. 48. The mayor and council shall have power to require any railroad company or companies, owning or operating any railroad track or tracks upon or across any public street or streets of the city, to erect, construct, reconstruct, complete and keep in repair any viaduct or viaducts, upon or along such street or streets, and over or under such track or tracks including the approaches to such viaduct or viaducts as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. Whenever any such viaduct shall be deemed and declared by ordinance necessary for the safety and protection of the public, the mayor and council shall provide for appraising, assessing and determining the damages, if any, which may be caused to any property by reason of the construction of such viaduct and its approaches. "The proceedings for such purpose shall be the same as provided herein for the purpose of determining damages to property owners by reason of the change of grade of a street, and such damages shall be paid by the city, and may be assessed by the city council against property benefited.

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“The width, height and strength of any such viaduct, and the approaches thereto, the material therefor, and the manner of the construction thereof shall be as required by the board of public works, as may be approved by the mayor and council.

“When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the proportion thereof, and the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council.

“It shall be the duty of any railroad company or companies, upon being required as herein provided, to erect, construct, reconstruct or repair any viaduct, to proceed within the time and in the manner required by the mayor and council, to erect, construct, reconstruct or repair the same, and it shall be a misdemeanor for any railroad company or companies to fail, neglect, or refuse to perform such duty, and upon conviction any such company or companies shall be fined one hundred dollars (\$100), and each day any such company or companies shall fail, neglect or refuse to perform such duty shall be deemed and held to be a separate and distinct offense, and in addition to the penalty herein provided any such company or companies shall be compelled by mandamus or other appropriate proceeding to erect, construct, reconstruct or repair any viaduct as may be required by ordinance as herein provided. The mayor and council shall also have power whenever any railroad company or companies shall fail, neglect or refuse to erect, construct, reconstruct or repair any viaduct or viaducts, after having been required so to do as herein provided, to proceed with the erection, construction, reconstruction or repair of such viaduct or viaducts by contract or in such other manner as may be provided by ordinance, and assess the cost of the erection, construction, reconstruction or repair of such viaduct or viaducts against the property of the railroad company or companies required to erect, construct, reconstruct or repair the same and such cost shall be a

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valid and subsisting lien against such property, and shall also be a legal indebtedness of said company or companies in favor of such city, and may be enforced and collected by suit in the proper court.

In May, 1890, the Union Pacific Railway Company, which now owns 21 tracks crossing Eleventh street beneath the said viaduct, entered into agreements with the Chicago, Rock Island & Pacific Railway Company and the Chicago, Milwaukee & St. Paul Railway Company, by the terms of which agreements it granted to those companies the right to possess and use, in common with itself, its main and passing tracks between certain points, which tracks are among the said 21 tracks, for the period of 999 years. Subsequently, in that year, the said companies entered into possession of the interest granted them, and have since continued to use the said tracks in common with their grantor.

By a concurrent resolution of the city council of Omaha, adopted July 21, 1892, it was provided that the city engineer and the committee on viaducts and railways should examine the roadbed of the said viaduct, and report whether or not it was necessary to repave it. Acting under this resolution, the committee made an examination, and on the 23d of the following month reported in writing that both the roadway and sidewalk of the viaduct were in a dangerous condition. By authority of the city, the viaduct was closed to general public travel some time in 1892, but continued to be used by a street railway company, whose tracks were laid across it, until the autumn of 1894, since which time the city has not permitted it to be used for any travel.

By an ordinance approved December 12, 1893, the city declared the necessity of repairing the viaduct, and empowered and directed the board of public works to prepare plans and specifications for the repairs. Such plans and specifications were thereafter prepared, and were submitted to the council December 15, 1893, by the board of public works and the city engineer; and on January 30, 1894, the council passed an ordinance,

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No. 3752, approved February 3, 1894, which is as follows :

"An ordinance approving the plans and specifications submitted by the board of public works for the repairing of the Eleventh street viaduct over the railroad tracks and ordering the repairing of said viaduct to be done.

"Whereas, it has been and hereby is deemed and declared necessary for the safety and protection of the public that the Eleventh street viaduct should be repaired as herein required; and

"Whereas, it is right, proper and reasonable that the railroad companies owning or operating railway tracks across said Eleventh street should make said repairs to said viaduct: Therefore

"Be it ordained by the city council of the city of Omaha:

"Section 1. That the plans and specifications submitted by the board of public works of the city of Omaha, December 15, 1893, for the repairs of the Eleventh street viaduct over the railroad tracks, upon and across Eleventh street, from a point near Jackson street to a point near Mason street, in the city of Omaha, as prepared by the city engineer of said city, be and the same are hereby approved and adopted.

"Sec. 2. That the Union Pacific Railway Company be and is hereby ordered, directed and required to repair that portion of said Eleventh street viaduct from the north end of said viaduct south for a distance of two-thirds of the entire length of said viaduct; and the Chicago, Burlington and Quincy Railroad Company, grantee and successor to the Missouri River Railroad Company in Nebraska and the Omaha and Southwestern Railroad Company, be and is hereby ordered, directed and required to repair that portion of said Eleventh street viaduct commencing at the south end thereof, and extending northward a distance of one-third of the entire length of said viaduct; the said repairs to be made in accordance with said plans and specifications, and to be done under the supervision of the city engineer; the

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said repairs to be commenced without unnecessary delay and fully completed, as herein required, within ninety days from the passage and approval of this ordinance.

“Sec. 3. That the city clerk be and is hereby directed to furnish to said Union Pacific Railway Company and to said Chicago, Burlington and Quincy Railroad Company, owning or operating railroad tracks upon and across said Eleventh street under said Eleventh street viaduct, a duly certified copy of this ordinance, without unnecessary delay, and that the city engineer is hereby directed to furnish to each of said railroad companies a copy of said plans and specifications, and to superintend the work of making said repairs.

“Sec. 4. That this ordinance shall take effect and be in force from and after its passage.”.

Certified copies of this ordinance and of the said plans and specifications were furnished to the defendant company, but it refused to make the said repairs, or to take any action with reference to making the same ; wherefore the present proceeding was instituted, as aforesaid.

Chas. J. Greene, for plaintiff in error.

W. J. Connell, for defendant in error.

MR. JUSTICE SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court.

The motion to dismiss the writ of error, on the ground that the rights and immunities of the plaintiff in error under the constitution of the United States were not set up or claimed in the state courts at the proper time and in the proper way, cannot be allowed.

This subject has been so frequently and so recently discussed by this court that it is unnecessary for us to further consider it at large. It is sufficient to say that this record discloses that the plaintiff in error, in its answer to the writ of mandamus issued out of the district court of Douglas county, state of Nebraska, claimed that by reason of certain provisions of its charter, of general laws of the state, and of ordinances of the city of Omaha, all of which were specifically set forth, a

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contract was created between the plaintiff in error and said city in respect to the viaduct in question, the obligations whereof would be violated by the proposed enforcement of the subsequent act of 1887, contrary to the provisions of the constitution of the United States; that the district court held that the laws and ordinances so pleaded did not create a contract between the state and city on the one side and the plaintiff in error on the other; that the plaintiff in error, in its petition in error, to the supreme court of the state, specifically assigned as error the holding of the trial court that the said laws, charter, and ordinances did not constitute a contract, within the meaning and protection of the constitution of the United States, guarantying the inviolability of contracts; and that the supreme court of the state, in its opinion disposing of the case, states that "the most important subject of inquiry is presented by respondent's contention that the ordinance under which the city proceeded in ordering the repairs in question contemplates the taking of its property without due process of law, within the meaning of the state and federal constitutions, and also impairs the obligation of the contract under which its track was laid and under which said viaduct was constructed."

We think it is plain from this recital that a federal question was specifically presented in both the trial and supreme courts of the state.

As the record further discloses that the state supreme court overruled the railroad company's contention that it held an existing contract whose obligation would be violated by the enforcement of the provisions of a subsequent law of the state, it becomes the duty of this court to inquire whether there was error in that judgment of the supreme court of the state.

We have often had occasion to say that this court, when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the constitution, possesses paramount authority to determine for itself the existence or the nonexistence of the contract set up, and

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whether its obligation has been impaired by the state enactment. *Bank v. Skelly*, 1 Black, 436 ; *Railroad Co. v. Rock*, 4 Wall. 177 ; *New Orleans Waterworks Co. v. Louisiana Sugar-refining Co.*, 125 U. S. 18, 8 Sup. Ct. 741 ; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 492, 14 Sup. Ct. 968.

We shall proceed, therefore, to examine whether the statutes and ordinances to which the plaintiff in error points us constituted a contract, within the protection of the constitution of the United States, and whether such contract, if found to exist, has been impaired by the subsequent statute and the proceedings thereunder.

The contract, which the plaintiff in error sets up as constitutionally protected from subsequent legislation, is alleged to be found in the act of March 4, 1885, and the agreement in compliance with the provisions of that act between the city of Omaha, the Union Pacific Railway Company, and the Omaha & Southwestern Railroad Company on the 1st day of February, 1886.

By the provisions of the act, the mayor and city council in any city of the first class were authorized, whenever they deemed it necessary for the safety and convenience of the public to engage and aid in the construction of any viaduct or bridge over or tunnel under any railroad track or tracks, switch, or switches in such cities, when such track or switches cross or occupy any street, alley, or highway thereof ; to adopt and secure plans and specifications therefor, together with the estimated cost of the work ; and thereupon, if the railroad company or companies across whose tracks or switches the work is proposed to be built will assume three-fifths of all damages to abutting property on account of the construction of said viaduct, bridge, or tunnel, and secure to the city the payment of the necessary funds to meet it as the work progresses, in such manner and with such security as the mayor and city council shall require, and when the payment of the further sum of one-fifth of the money required for said improvement is arranged for in manner

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satisfactory to said mayor and council, either by private donations or by execution of such good and sufficient bonds as will protect said city from the payment of said one-fifth, then the said mayor and council may proceed to contract with the necessary party or parties for the construction of such viaduct, bridge, or tunnel, under the supervision of the board of public works of such city, and to provide for the payment of one-fifth of the cost thereof by the city, by special tax on all taxable property in such city, and one-fifth by special tax on property benefited. It was further provided that the city, with the assent of the railroad company or companies aiding in the construction of any such viaduct, bridge, or tunnel, may permit any street-railway company to build its street-railway track and operate its railway upon or through the same, upon such terms and conditions and for such compensation as shall be agreed upon between the city and the street-railway company, and that the compensation for such use shall be set apart and used towards the maintenance of such viaduct, bridge, or tunnel; and it was further provided that the mayor and council of any such city should have the power to pass any and all ordinances, not in conflict with the act, that might be necessary or proper for the construction, maintenance, and protection of the works provided for.

The agreement made, in pursuance of the said act between the city of Omaha, as party of the first part, and the Union Pacific Railway Company and the Omaha & Southwestern Railroad Company, as parties of the second part, provided that the parties of the second part assumed and agreed to pay, as should be required by the mayor and city council, three-fifths of the entire cost of constructing a viaduct along Eleventh street in said city over the railroad tracks of the said second parties, and three-fifths of the damages to abutting property on account of the construction of such viaduct, not otherwise provided for by waivers or private contributions, such entire cost and damages not to exceed the sum of \$90,000; and that the amount so assumed and

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agreed to be paid, being three-fifths of the entire cost and damages, was to be apportioned between the railroad companies, so that three-fourths thereof should be paid by the Union Pacific Railway Company and one-fourth by the Omaha & Southwestern Railroad Company.

Under this agreement, the viaduct was built and formally opened to the use of the public early in the year 1887.

By an act approved March 30, 1887 (Laws Neb. 1887, p. 105), entitled "An act incorporating metropolitan cities, and defining, regulating and prescribing their duties, powers and government," it was, among other things, provided as follows: "The mayor and council shall have power to require any railroad company or companies, owning or operating any railroad track or tracks upon or across any public street or streets of the city, to erect, construct, reconstruct, complete and keep in repair any viaduct or viaducts upon or along such street or streets and over or under such track or tracks, including the approaches to such viaduct or viaducts as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. * * * When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the proportion thereof, and of the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council. After the completion of any such viaduct, any revenue derived therefrom by the crossing thereon of street railway lines or otherwise shall constitute a special fund, and shall be applied in making repairs to such viaduct. All ordinary repairs to any such viaduct or to the approaches thereto shall be paid out of such fund, or shall be borne by the city."

In 1893 another act was passed (Laws Neb. 1893, p. 70), amending the act of 1887, and making it the duty of any railroad company or companies to erect, construct or repair any viaduct in the manner required by the mayor and council, providing a penalty for neglect or

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refusal to perform such duty, and prescribing a proceeding by mandamus to compel the companies to erect or repair any viaduct as may be required by ordinance, and empowering the city, in case of failure or refusal by the railroad companies, itself to do the necessary work, the cost thereof to be a charge and lien upon the property of the railroad companies, and also to be a legal indebtedness of the companies, collectible by suit in the proper court. On January 30, 1894, the city council passed an ordinance requiring the Union Pacific Railway Company to repair that portion of the said Eleventh street viaduct for a distance of two-thirds of the entire length of the viaduct, and the Chicago, Burlington & Quincy Railroad Company, as grantee and successor of the Omaha & Southwestern Railroad Company, to repair the other one-third portion of said viaduct, said repairs to be made in accordance with plans furnished by the city, and under the supervision of the city engineer, and to be completed within 90 days. And upon the refusal of the companies to comply with said ordinance separate proceedings in mandamus were brought against them.

No doubt, the agreement of 1886 constituted a contract in such a sense that the respective parties thereto continued to be bound by its provisions so long as the legislation in virtue of which it was entered into remained unchanged. While the agreement lasted, its provisions defined the rights and duties of the city and the railroad companies. But was it a contract whose continuance and operation could not be affected or controlled by subsequent legislation?

Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms, without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation.

Where, however, the respective parties are not private persons, dealing with matters and things in which the

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quent Acts.

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public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject-matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health, and morals, and that clause of the federal constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that, when such contracts are entered into, it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature.

We do not, indeed, understand that these principles are questioned on behalf of the plaintiff in error. What is claimed is that the subject-matter of the contract in question does not fall within the range of the police power of the state. It is argued that, "while it may be true that a viaduct over railroad tracks located across a public street may be essential to the public safety, it does not follow that a legislative enactment impairing the obligation of an existing contract is necessary to secure its construction and maintenance, and that any attempt upon behalf of the state to establish a viaduct through such legislation, however necessary the viaduct itself may be to the public safety, would be an invasion of the federal jurisdiction, unless adopted under the compulsion of state necessity; that, while it is not questioned that the maintenance of the viaduct is essential to the safety of the community, yet, if existing contract obligations devolve this burden upon the city, the legislature of the state cannot, under the plea of public necessity, pass a law imposing it upon the plaintiff in error, without bringing the act within the prohibitions of the federal constitution."

Before considering this proposition, it is proper to observe that it proceeds upon the assumption that, by

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the agreement between the parties in the present case, the duty of repairing and maintaining the viaduct was put upon the city. But an examination of the terms of the contract fails to show that this assumption is well founded. Certainly, there is therein no express provision or stipulation that, after the viaduct had been constructed, its future repair and maintenance should be at the cost of the city. It is, however, contended that, as the viaduct when constructed became a part of Eleventh street, and as the law implies a duty on the city to keep its streets in a safe condition, such a duty entered into this contract as a part thereof, and therefore the city, by the execution of the contract, became bound to keep the viaduct in repair. On the other side, however, it was equally made the duty of the railroad company by the statute of Nebraska, under which this agreement was made, "to maintain and keep in good repair all bridges, with their abutments, which such corporation shall construct for the purpose of enabling their road to pass over or under any turnpike, road, canal, water-course, or other way."

While, therefore, it is the equal duty of the city and of the railroad company to guard the safety of the public by the erection and maintenance of a proper crossing or viaduct, it does not follow that, in the absence of an express agreement to that effect, such a duty is, by implication of law, devolved upon one party to the relief of the other. Indeed, the contract in question shows that, in consideration of their mutual duty to the public, the parties participated in the expense of the construction of the viaduct; and it would seem to be a reasonable implication that there should be a common obligation to keep it in repair.

However this may be, we think that, in view of the paramount duty of the legislature to secure the safety of the community at an important crossing within a populous city, it was and is within its power to supervise, control, and change such agreement as may be, from time to time, entered into between the city and the railroad company in res-

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pect to such crossing, saving any rights previously vested. Any other view involves the proposition that it is competent for the city and the railroad company, by entering into an agreement between themselves, to withdraw the subject from the reach of the police power, and to substitute their views of the public necessities for those of the legislature.

This subject has been so often considered by this court that it seems needless to here enlarge upon it. It is sufficient to cite a few of the cases. *Beer Co. v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park, Id.* 659; *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Mfg. Co.*, 115 U. S. 650, 6 Sup. Ct. 252; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273.

In *New York & N. E. R. Co. v. Town of Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, the subject was elaborately considered, and it was there held that an act of the state of Connecticut relating to railway crossings, being directed to the extinction of grade crossings as a menace to public safety, was a proper exercise of the police power of the state; that there is no unjust discrimination and no denial of the equal protection of the laws, in regulations regarding railroads, which are applicable to all railroads alike; and that the imposition upon a railroad corporation of the entire expense of a change of grade at a highway crossing is no violation of the constitution of the United States, if the statute imposing it provides for an ascertainment of the result in a mode suited to the nature of the case. It is true that in that case there was a provision in the charter of the railroad company reserving a right to the legislature to alter and amend the same; but this court based its reasoning and conclusion entirely upon the police power of the state. The following language of the supreme court of Connecticut was quoted with approval: "The act, in scope and purpose, concerns protection of life. Neither in intent nor in fact does it increase or diminish the assets of either the city or of the railroad companies. It is the exercise of the gov-

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ernmental power and duty to secure a safe highway. The legislature, having determined that the intersection of two railways with a highway in the city of Hartford at grade is a nuisance, dangerous to life, in the absence of action on the part either of the city or of the railroads, may compel them severally to become the owners of the right to lay out new highways and new railways over such land, and in such manner as will separate the grade of the railways from that of the highway at intersection; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone, or in part by both; and may enforce obedience to its judgment."

Wabash R. Co. v. City of Defiance, 167 U. S. 88, 17 Sup. Ct. 748, was a case much like the present one. It was there held, affirming the supreme court of Ohio, that the legislative power of a city may control the question of grades and crossings of its streets, and a power to that effect, when duly exercised by ordinances, will override any license or consent previously given, by which the control of a certain street had been surrendered; that such matters cannot, from their public nature, be made the subject of a final and irrevocable contract.

Another ground of complaint is that the act in question delegates to the municipality authority, in cases where two or more railway companies own or operate tracks across public streets to impose the cost and expense of constructing and maintaining viaducts over the same upon either or any of such companies, and that the city ordinance, in execution of such authority, imposes upon two of the four companies named in the record the entire expense of the repairs in question; and this is said to deny the plaintiff in error the equal protection of the law.

It is true that, by virtue of agreements between the Union Pacific Railway Company and the Chicago, Milwaukee & St. Paul Railroad Company and the Chicago, Rock Island & Pacific Railroad Company,

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the two latter companies were using certain tracks belonging to the former which were under said viaduct. But it is not easy to see why the plaintiff in error can complain that the city omitted to bring those companies in as parties. The nature and extent of their rights under the agreements with the Union Pacific Railway Company do not appear, and, for aught that is disclosed in this record, it may have been a feature of those agreements that the Union Pacific should protect them from any charge or exaction of the kind in question.

Again, it is said that the apportionment made by the ordinance of the extent of the repairs, one-third to the plaintiff in error, and two-thirds to the Union Pacific Railway Company, was arbitrary, without notice, and contrary to plain principles of justice and equality.

But if, as we have seen, it would have been competent for the legislature to have put the burden of these repairs upon one of the parties, or to have apportioned them among the parties, as it saw fit, so it may make a due apportionment through the instrumentality of the city council. The latter was not directed to proceed judicially, but to exercise a legally delegated discretion.

In *State v. Missouri Pac. Ry. Co.*, 33 Kan. 176, 5 Pac. 772, the power of the city of Atchison to compel the respondents to construct viaducts was sustained under legislation similar to that herein involved, and, referring to the subject of notice, the court, per JUDGE VALENTINE, said: "We do not think it necessary that the city should have given the railroad companies notice, before passing the ordinance, requiring them to construct the viaduct. Notice afterwards, with an opportunity on the part of the railroad companies to contest the validity of the ordinance and the right of the city to compel them to construct the viaduct, is sufficient."

Health Department of New York v. Rector, etc., of Trinity Church, 145 N. Y. 32, 39 N. E. 833, was the case of an action to recover a penalty under a statute requiring all tenement houses to be supplied with water

Same—Apportionment of Burden.

Passage of Ordinance—Railroads' Right to Notice.

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on each floor occupied or intended to be occupied by one or more families, whenever so directed by the board of health. The statute made no provision for notice to property holders, and none in fact was given, while it was admitted that it would cost the respondent a considerable sum of money to comply with the order of the board.

In the opinion of the court, per PECKHAM, J., it was said: "The legislature has power, and has exercised it in countless instances, to enact general laws upon the subject of the public health or safety, without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect in a particular case. * * * The fact that the legislature has chosen to delegate a certain portion of its power to the board of health would not alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order. * * * Laws and regulations of a police nature, although they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbance. They do not take private property for public use, but simply regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

So, in the present case, while no notice may have been given to the railroad companies of the pendency of the ordinance, and while they may not have been invited to participate in the proposed legislation, yet they had an opportunity to, and did in fact, put in issue, by the answer, both the validity of the ordinance and the reasonableness of the amount apportioned to them respectively for the repair of the viaduct in question.

The validity of the statute and of the ordinance having

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FINNEY.

(Supreme Court of Georgia, Aug. 7, 1897.)

Power of Railroads to Mortgage Property*—Mortgage of Income—Validity.—Authority to mortgage “a part or the whole of its entire property and franchise” does not empower a railroad company to mortgage its “income, rents, and profits.”

Same—Construction of Charter.—Where the charter of a railroad company in express terms defines and limits its power to mortgage, a general provision in a preceding section of the charter authorizing the company to build a railroad, “and the same to use, equip, and enjoy all the rights, privileges, and immunities granted to” another named railroad company, does not confer upon the former company the mortgaging power of the latter under its charter.

Same—Construction of Statute.—Section 1689 of the Code of 1882, which confers, upon any railroad company incorporated under the general law of which this section is a part, power to mortgage its “railroad track, depots, grounds, rights, privileges, franchises, immunities, machine houses, rolling stock, furniture, tools, implements, appendages and appurtenances, used in connection with such railroad or railroads, in any manner then belonging to said company, or which shall thereafter belong to it, gives no power to mortgage income, because the mortgaging power expressed in the language of this section applies only to specified kinds of property, not including income, in possession when the mortgage is executed, and to like kinds of property to be thereafter acquired.

Same.—It results from the foregoing that the mortgaging power of the Georgia Southern & Florida Railroad Company, whether derivable from its special charter or from the general law for the incorporation of railroads, did not include authority to mortgage its income; and though it executed a mortgage purporting to cover the same, and this mortgage was foreclosed accordingly, its lien did not, as to third persons not bound by the judgment of foreclosure, attach to such income.

Foreclosure—Intervention—Priority.—Under the special facts of this case, the present intervention growing out of the main equitable proceeding in consequence of which the property of this railroad

*See note at end of case.

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company was brought into court for administration should not be held to be a "traders' bill" against that company; and the rights of the parties now before the court are to be determined just as if this was an ordinary contest over a fund in court between a mortgagee whose mortgage had been foreclosed and a judgment creditor of this mortgagor.

Same—Preferences.—This being the nature of the case, the trial judge rightly held that the judgment creditor was entitled to preference, he having a lien attaching to the fund in controversy, and the contestant's right thereto depending upon the alleged priority of a mortgage which, relatively to this judgment, had no lien upon such fund.

Same.—Upon the theory that the mortgages dealt with in the case of *Green v. Railroad Co.*, 24 S. E. 814, 97 Ga. 15, had no lien upon the income of that company, because of a want of authority on its part to mortgage income, the present decision and the decision in that case are in complete accord. In so far as the decision in that case lays down the doctrine that, even if the mortgage did cover income, the lien of the judgment creditor was nevertheless entitled to priority, it is not applicable to the case now in hand.

(syllabus by the Court.)

ERROR from Bibb county superior court.

Decrees in favor of interveners. *Judgments affirmed.*

John L. Hull, for plaintiff in error.

Dessan & Bartlett and *Hardeman, Davis & Turner*, for defendants in error.

LUMPKIN, P. J. On the 30th day of January, 1888, the Georgia Southern & Florida Railroad Company executed and delivered to the Mercantile Trust & Deposit Company of Baltimore, as trustee, a mortgage to secure the payment of certain bonds issued by the mortgagor. This mortgage was duly recorded, and purported to create a lien "on all the property, franchises, and rights of said railroad company, and on its income, rents, and profits." Certain creditors of the Macon Construction Company instituted against it, to the superior court of Bibb county, an equitable petition, under which, on the 14th day of March, 1891, a receiver was appointed to take charge of and administer its assets. This receiver seized and took possession of all the property, both real and personal, of the above-named railroad company; and, in the litigation which followed, this property was for

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many purposes treated and dealt with as assets of the construction company. The trustee, for the bondholders, on March 30, 1891, obtained an order allowing it to be made a party to the case, simply for the purpose of filling "such pleadings in the future in its own behalf as may be legal and just." On May 23, 1891, Barton obtained a judgment against the railroad company, in an action for personal injuries, which was commenced October 14, 1890; and on May 25, 1892, Finney obtained against this company a judgment in a similar action, brought December 19, 1891. Neither Barton nor Finney was, or had ever been, a party to the equitable proceeding above mentioned at the time the judgment in his favor was rendered. Both subsequently became parties, as will hereinafter appear. On October 12, 1892, the trustee began active proceedings for the foreclosure of the mortgage, and filed an intervention for that purpose, which resulted, on November 17, 1893, in a judgment of foreclosure establishing in favor of the mortgagee a lien upon all the property described in the mortgage, including income realized from the operation of the railroad. At a sale had under this judgment, all the property of the railroad company, including its franchises and rights of every kind, was sold at public outcry, and bought by the bondholders. This sale was confirmed, and the degree of confirmation provided that the receiver and the commissioners appointed to conduct the sale should make to the purchasers a proper conveyance. This decree also provided that the income in the receiver's hands at its date should be turned over to the commissioners, "to be applied to the payment of such claims as might be adjudged to have priority over the bonds, * * * the surplus, if any, after paying such claims, * * * to be turned over to the holders of the bonds." After all these things had occurred, Barton and Finney filed separate interventions, setting up therein that, as to income in the receiver's hands, their judgments were entitled to precedence over the claim of the bondholders. The Georgia Southern & Florida Railway Company, which

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had in the meantime been organized, and which was the successor in right to the purchasing bondholders, became a party, and contested these interventions. The trial court, upon the facts above stated, held that the judgments in favor of Barton and Finney were entitled to payment out of the income, and the railway company excepted. This court agrees with his honor, JUDGE FELTON, in the conclusion he reached, and we will now proceed to deal with the legal questions presented, the proper solution of which, we think, leads necessarily to an affirmance of the judgments under review.

1. 2. In the first place, we hold that the Georgia Southern & Florida Railroad Company had no authority of law to mortgage its "income, rents, and profits." It was claimed by the plaintiff in error that this company did have such authority under a legislative charter, embraced in an act passed September 28, 1881, which, in the fourth section thereof, expressly conferred upon it the power "to issue mortgage bonds of the company, in such form as the directors may prescribe, upon a part or the whole of its entire property and franchise." See Acts 1880-81, pp. 277, 278. It was earnestly insisted that a grant of power to a railroad company to mortgage its franchises necessarily includes power to mortgage income. Whatever may be the law in other jurisdictions, we are satisfied that section 1954 of the Code of 1882 (which embodies the law of force when this mortgage was executed) settles this question adversely to the contention of counsel for the plaintiff in error. Under the provision of that section, a mortgage can lawfully embrace only "property in possession, or to which the mortgagor has the right of possession at the time" of executing the mortgage, save only as to stocks of goods or other things in bulk, but changing in specifics. Under this law, therefore, neither a corporation nor a natural person has the right to mortgage property which may be acquired after the execution of the mortgage; and, as income to be made is necessarily in the nature of a

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future acquisition, we think it quite clear that the authority conferred upon this company in the language above quoted from its special charter did not give it any power to mortgage its income, rents, or profits.

It was, however, further urged, that other language contained in this special charter conferred upon the company the right to mortgage "after-acquired property." The second section of the act in question gave the company authority to build a railroad from the city of Macon to Homer-ville or Dupont, in Clinch county, and thence to Florida line, "and the same to use, equip, and enjoy all the rights, privileges, and immunities granted to the Central Railroad and Banking Company of Georgia, except banking privileges, and except exemption from taxation, and subject to the same liabilities imposed upon said company." It appears that in 1872 the general assembly empowered the Central Railroad & Banking Company of Georgia, and other companies, "to mortgage or convey in trust, by way of mortgage, all their property, estate, rights, privileges, and franchises, now or hereafter to be held or granted." See Acts 1872, p. 331. While the language last quoted is apparently broad enough to include the power to mortgage income, we do not think this power was conferred upon the Georgia Southern & Florida Railroad Company by virtue of the provision in its charter to which reference is last above made. As will have been observed, this charter, in the fourth section, undertook to deal specifically with the mortgaging power intended to be conferred upon this company; and accordingly the act, in express terms, defined and limited the power to mortgage, and, in so doing, confined the operation of this power to a "part or the whole of its entire property and franchises"; that is, so far as relates to property, to such only as the company might have in its actual possession, or have the right to possess, at the time of executing the mortgage. We are therefore quite sure that the mortgaging power of the Central Railroad & Banking Company was not in contempla-

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tion, and that no reference to it was intended, when that provision of the charter was inserted granting to the Georgia Southern & Florida Railroad Company, with specified exceptions, certain rights, privileges, and immunities which had been previously conferred upon the Central Company. The rights, etc., here referred to, were obviously those which pertained to surveying, laying out, and building the railroad, selecting the line of its route, acquiring and condemning land for rights of way, and other privileges and franchises of a like general nature. The general assembly was, we think, in the second section of this special charter, simply undertaking to confer these general rights, and nothing more; for if it had, by the language employed, designed conferring upon the new company the mortgaging power enjoyed by the Central Railroad & Banking Company, there would have been no occasion whatever for specifically defining and setting forth, in another section of the charter, the powers which the Georgia Southern & Florida Railroad Company should have as to creating mortgages.

Indeed, we think the conclusion is irresistible that the general assembly intended to state in express terms exactly what this power should be. Another reason for this conclusion is that, if the second section of the act was designed to confer power upon the company to mortgage "after-acquired property," the power thus given would have been greater than that conferred in the fourth section, which, as has been seen, limited the mortgaging power to property in existence and owned by the company at the time of executing the mortgage. Two such powers could not consistently stand together, and it is hardly to be presumed that the legislature intended to stultify itself by placing directly conflicting provisions in such close proximity to each other in one short act. The act of October 16, 1885 (Acts 1884-85, p. 268), amending the charter of this company, adds no strength whatever to the contention that the company acquired the mortgaging power of the Central Railroad & Banking Company.

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This last act did not undertake to deal in any manner with the mortgaging power. Among other things, it, in the second section, provided for certain changes in the proposed direction of the railroad, and then declared how this section would read when thus amended. In setting it forth in its amended form, there was simply a retention of the language relating to the rights, privileges, and immunities of the Central Railroad & Banking Company as it stood in the original act before the amendment in question was introduced.

3. In *Georgia S. & F. R. Co. v. Mercantile, Trust & Deposit Co.*, 94 Ga. 306, 21 S. E. 701, it was held that, even if the special charter of this railroad company was unconstitutional, it could, as a *de facto* corporation, issue bonds and execute a mortgage to secure the same, under the provisions of the general law of this state for the incorporation of railroad companies. The provisions of that general law, embraced in section 1689 of the Code of 1882, conferring upon railroad companies the power to mortgage, is quoted in the third headnote. An examination of the language in which this power is expressed will readily disclose that it confers no power to mortgage income. The power is given to mortgage a number of enumerated kinds of property "then [that is, at the date of the mortgage] belonging to the company, or which shall thereafter belong to it." In other words, property of like kinds which the company may subsequently to the execution of the mortgage acquire may also be included in a mortgage covering property of this description already in possession. Among the specified kinds of property either owned or to be acquired upon which the company may place a mortgage, income is not included; and we therefore, without difficulty, come to the conclusion that, even if the section of the Code last above mentioned may properly be looked to in ascertaining the extent of the powers and privileges enjoyed by the Georgia Southern & Florida Railroad Company, no power on its part to mortgage income is derivable therefrom.

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4. We have not undertaken, because it has not been at all necessary to do so, to decide whether the special legislative charter of this company is, or is not, constitutional. We have, however, in looking to it, and also to the general law for the incorporation of railroads, exhausted all possible sources from which this company could derive any authority to create a mortgage; and we think we have made it appear that neither in the special charter (assuming it to be valid) nor in the general law (upon the theory that it is applicable) is there any express authority, or authority arising from necessary implication, which could properly be held as empowering this company to mortgage its income.

Same.

5. 6. The equitable petition in which the interventions now under consideration were filed can in no proper sense be treated as a traders' bill against the Georgia Southern & Florida Railroad Company. As between the original plaintiffs, creditors of the Macon Construction Company, and the latter company, it could properly be so regarded. The mere fact, however, that a receiver of the original defendant seized the property of the railroad company, and administered the same as assets of the construction company, does not place creditors of the railroad company coming in by intervention, and, as such, claiming assets belonging to the railroad company, in the same position as creditors of the construction company making contests over the proceeds of the railroad company's property, as assets of their debtor; nor does such fact give to these latter proceedings the character of a creditors' petition. As between the trustee of the bondholders and Barton and Finney, this case should be treated as if the trustee had instituted an original foreclosure proceeding, had sold the property, and a portion of its proceeds, while in the hands of the court for distribution, was being claimed by Barton and Finney under their respective judgments. Thus viewing the matter, the foreclosure proceedings should not be regarded as having been commenced until the

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Priority.

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12th of October, 1892; for the first appearance of the trust company in the case, as will have been seen, was merely passive. Fixing the date last mentioned as that upon which the proceedings to foreclose the mortgage really began, it will be noted that Barton and Finney had already, before that time, reduced their claims against the railroad company to judgment. On the whole, therefore, the rights of the parties now before the court should be determined just as if this was an ordinary contest over a fund in court between a mortgagee whose judgment had been foreclosed and a judgment creditor of the mortgagor. Dealing with the case from this standpoint, the only conclusion which, in view of what is above laid down, could properly be reached, is that the judgments of Barton and Finney were, in preference to the bondholders' claim, entitled to payment out of the fund in the commissioners' hands arising from income. These judgments constituted valid liens upon all the property of the railroad company, not, of course, capable of enforcement by levying the same upon the money in the commissioners' hands, but certainly capable of being made effectual by an appropriate equitable decree.

The trustee of the bondholders, as between itself and the railroad company, had a good judgment, binding both the corpus and income; but the lien of Same—Preferences. this judgment could not in any manner affect the rights of either Barton or Finney, who were not parties to the proceeding at the time this judgment was obtained, but who subsequently filed their respective interventions for the very purpose of setting up this fact, and claiming that, as between themselves and the bondholders, they were entitled to be paid out of the fund in court awaiting distribution, in conformity to the court's decree providing that it "be applied to the payment of such claims as might be adjudged to have priority over the bonds." As has been seen, their claim of preference was well founded. Relatively to them, the mortgage which had been foreclosed was not a lien upon the fund out of which they asked payment;

Note

and they having a lien upon it, and the trustee of the bondholders (as to Barton and Finney) having none whatsoever, equity necessarily gives them the preference.

7. This court was asked to review the decision made in the case of *Green v. Railroad Co.*, 97 Ga. 15, 24 S. E. 814. The brief statement contained in the seventh headnote with respect to this case will suffice to show that a review of it is not essential to a proper determination of the case now before us, and would therefore be both unprofitable and inappropriate. Judgment in each case affirmed.

Same.

NOTE.

Power of Railroads to Mortgage Corporate Property.—See generally 61 Am. & Eng. R. Cas., 688 *et seq.* 46 Am. & Eng. R. Cas. 292 *et seq.*

Railroad companies are created to answer a public object and are bound to the state for the performance of their public duty. There can be no act which would amount to a renunciation of their duty to the public or which would directly or necessarily disable them from performing it. They, therefore, cannot convey away their franchises or corporate rights, nor the track and right of way which they take and hold for the necessary use of their road. *Pierce v. Emery*, 32 N. H. 484. Upon this principle the law is well settled that a railroad company cannot, without special authority, mortgage its franchises and its property essential to the exercise thereof. *Arthur v. President, etc.*, 9 S. & M. (Miss.), 394. But the rule has been applied with the greatest strictness to railway franchises. It has been stated very broadly by the supreme court of Massachusetts. A corporation created for the very purpose of constructing, owning, and managing a railway for the accommodation and benefit of the public, cannot, without distinct legislative authority, make any alienation, absolute or conditional, either of its general franchise to be a corporation, or of the subordinate franchise to manage and carry on its corporate business without which its franchise to be a corporation can have little more than a nominal existence. *Richardson v. Sibley*, 11 Allen, (Mass.), 65; *Shrewsbury & B. R. Co. v. London & N. R. Co.*, 6 H. L. Cas. 136; *York & Maryland Line R. Co. v. Winans*, 17 How. (U. S.), 39; *Pierce v. Emery*, 32 N. H. 504; *Hall v. Sullivan R. Co.*, 21 Law Reporter, 140; *Worcester v. Western R. Co.*, 4 Metc. (Mass.), 566; *Commonwealth v. Smith*, 10 Allen, (Mass.), 448; *Coe v. Columbus P. & I. R. Co.*, 10 Ohio St. 732. *Arthur v. President, etc.*, 9 S. & M. (Miss.), 394. A corporation can transfer its franchise only so far as authorized by law. *Wood v. Bedford, etc., R. Co.*, 8 Phila. (Pa.), 94. A railroad company is not authorized by common law to mortgage its franchises without

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further authority than is conferred by its act of incorporation. *Commonwealth v. Smith*, 10 Allen (Mass.), 448. In *McAllister v. Plant*, 54 Miss. 106, the question whether a railroad company can mortgage its franchise in the absence of statutory authority was considered but not decided. It has been argued that since mortgages are in some sense property, the power to mortgage all property is therefore power to mortgage all franchises. This argument, however, has been held to be unsound. *Pullan v. Cincinnati & C. A. R. Co.*, 4 Biss. (C. C.), 35. Likewise a street railway company has no power to mortgage its franchise, road, or property, without legislative authority. *Richardson v. Sibley*, 11 Allen, (Mass.), 65. And a general business corporation, without some statute allowing it, can neither sell nor mortgage its franchise. *Carpenter v. Black Hawk G. M. Co.*, 65 N. Y. 43; *Susquehanna Canal Co. v. Bonham*, 9 W. & S. (Pa.), 27, 42 Am. Dec. 315; *Arthur v. President, etc.*, 9 S. & M. (Miss.), 394, 48 Am. Dec. 719; *New Orleans, etc., R. Co., v. Harrif*, 27 Miss. 517; *Stewart v. Jones*, 40 Mo. 14.

FOX

v.

HARTFORD & W. H. H. R. Co.

(Supreme Court of Errors of Connecticut, Nov. 30, 1897.)

Coupons—Transfer of Title.—Where bonds of uncertain value, with coupons attached, were transferred to plaintiff, who was in possession of them as pledgee, and the transferror does not intimate in any way that the coupons are not to pass with the bonds, and the only fact claimed to be adverse to the conclusion that they did so pass is that nothing was said in regard to them, it was not error to decide that they did pass with the bonds.

Admissibility of Evidence.—Evidence in regard to the secret intentions of a transferror of bonds and coupons as to the effect of such transfer was properly excluded.

Negotiability of Over-due Coupons.—A transferee of over-due coupons takes them subject to all defenses and equities which would have been available to the railroad company, at the time of the transfer, against the transferror; but when the company relies upon an alleged agreement between it and the transferror to the effect that the coupons should be payable when convenient to the company, it must show that such agreement was in force at the time of the transfer, and that it was based on a valid consideration.

Interest on Matured Coupons.*—Overdue coupons attached to railroad bonds earn interest subsequent to the demand of payment.

*See 9 Am. & Eng. R. Cas. N. S. 321 and a. 327 *et seq.*

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APPEAL by defendant from Hartford county court of common pleas. *Affirmed.*

William F. Henney, for appellant.

Sidney E. Clark, for appellee.

TORRANCE, J. In his reasons of appeal the defendant in substance claims that the trial court erred (1) in holding that the title to the coupons passed to the plaintiff with the bonds; (2) in excluding certain testimony; (3) in holding that the plaintiff did not take the overdue coupons subject to the "arrangement" between Henney and the defendant; (4) in allowing any interest upon the coupons. These claims will be considered in the order stated.

We are of opinion that there was no error in holding, upon the facts found, that the plaintiff, as the undisputed owner of the bonds, also owned the coupons.

The bonds, with the coupons attached to them, were voluntarily delivered to the plaintiff by the defendant, at some time prior to the making of the contract, by way of pledge for a debt. The plaintiff, from the time this pledge was made to the time the contract was made, with the full knowledge and assent of the defendant, held both the bonds and the coupons as security for his debt. The bonds were of uncertain market value, and not readily salable. Just before the making of the contract, then, Henney owned the bonds and the coupons, and both were in the possession of the plaintiff by way of pledge. It was under these circumstances that the transaction of January 4, 1896, took place. By that transaction it is conceded that the plaintiff became the absolute owner of the bonds which were then in his hands, subject only to Henney's right to repurchase as provided for in the contract, and by it also Henney's debt to the plaintiff was paid and the stock notes were surrendered to Henney. At the time Henney thus transfers the title to the bonds to the plaintiff he does not ask to have the coupons surrendered to him, nor does he in any way intimate that they are not to pass with the bonds, and

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the plaintiff, with Henney's full consent, retains possession of them. Upon these facts the inference is well nigh irresistible that the parties intended that the coupons should pass with the bonds. About the only fact claimed to be adverse to this conclusion is the fact that nothing was said one way or the other about the coupons; but this fact is only one of evidential value, and as such is of comparatively slight importance; certainly by itself it is by no means conclusive. Suppose the bonds, with the coupons attached, had been in Henney's hands when the contract was made, and pursuant to its provisions he had passed the bonds with the coupons attached over to the plaintiff, could there be any reasonable doubt that he intended to transfer the coupons as well as the bonds, even if nothing had been said about the coupons? We think not. Upon the facts found, and with reference to the point now under consideration, the present case does not essentially differ from the case supposed. The trial court was fully justified in holding that the coupons passed to the plaintiff with the bonds.

The court excluded evidence of the amount realized by the plaintiff from the disposition of the light and power company stock, and of this the defendant complains. Upon the conceded facts in the case, it is difficult to see how the defendant had any interest in this matter. Henney might have had such an interest, but he was not a party. That evidence was admissible only on the theory that the stock when disposed of was held merely as collateral for Henney's debt, and that this point was in issue in the case. But the uncontradicted evidence in the case showed that the stock was the plaintiff's absolute property, and no evidence was offered to show that it was not; and, further, the point was not in issue. The evidence, for all the purposes for which it was offered, was irrelevant and was rightly excluded. Henney, as a witness, was asked, "Was it your intention to convey the coupons?" This question really called for evidence of the actual, secret, unmanifested intention of Henney,

Admissibility of
Evidence.

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which under the circumstances, was of no legal significance. The real question was as to his manifested intention, and this could be ascertained only from the contract, read in the light of the circumstances under which it was made. The evidence was properly excluded. *Hotchkiss v. Higgins*, 52 Conn. 205.

The next question is whether the court erred in holding that the plaintiff did not take the two overdue coupons subject to the arrangement between Henney and the defendant company. It Negotiability of Over-due Coupons. must be conceded that these two coupons are negotiable instruments, and that the plaintiff took them when they were overdue. The fact that these two coupons were overdue would not necessarily affect the plaintiff's title to the bonds, nor to the coupons not overdue (2 Daniel, Neg. Inst. [3d Ed.] par. 1506a; Tied. Com. Paper, § 473), nor is it claimed that it would do so; the only claim made is that it affected the title of these two coupons. It may be conceded, also, as claimed by the defendant, that in taking these two overdue coupons the plaintiff took them subject to all defenses and equities which would have been available to the defendant against Henney. 2 Daniel, Neg. Inst. par. 1505; Tied. Com. Paper, par. 473. The defenses and equities which would have been thus available are confined to those which existed and attached to the coupons themselves in the hands of Henney at the time of the transfer, and do not include defenses and equities arising out of collateral transactions. *Simpson v. Hall*, 47 Conn. 417. In other words, the plaintiff took such title to the overdue coupons as Henney had to convey. "The indorsee of overdue paper takes it as a holder with notice that it is subject to some defense, for he takes it at a time when in due course it should have been paid. He therefore takes it subject to the defense (1) that it was affected in its inception with some inherent vice, as, for instance, fraud, illegality, or duress; or (2) that the consideration failed, or that payment had been made, or that there had been accord and satisfaction, at the time of the indorsement, or that there was some equi-

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table defense arising out of the transaction in which the paper was given, which disabled his indorser in whole or in part. Any of these defenses is called an equity attaching to the instrument." 1 Daniel, Neg. Inst. par. 725a ; Tied. Com. Paper, par. 295. The arrangement found to have existed between Henney and the defendant is that Henney "was not to present the coupons for payment until it was convenient for it to pay them." The utmost that can be claimed for this is that it was in effect an agreement not to bring suit upon the coupons until it was convenient for the company to pay them ; and it admits of grave doubt whether a collateral agreement of this kind, which so directly contradicts the language of the coupon, is not a defense or an equity arising out of a collateral transaction by which the plaintiff would not be affected. It is not, however, necessary to determine that question here, for we think, upon the facts found, it is not shown that the company could have availed itself of this arrangement even as against Henney, and, if so, the plaintiff cannot be affected by it. It is found that Henney, who was president of the defendant company, "had had an arrangement" of the kind indicated, but it is not found that it was in existence when the coupons were transferred to the plaintiff. For aught that appears, it may have ceased to exist long before that time. Then, again, it is not shown that there was any consideration for the forbearance on Henney's part, or that he was in any way legally or equitably bound to forbear, or to continue his forbearance, for any length of time. It is not even shown that there was any contract or agreement at all, with or without consideration, on Henney's part, not to present the coupons for payment. For aught that appears, it was merely an understanding or "arrangement" to last during the pleasure of Mr. Henney, and not at all obligatory upon him, legally or equitably. Under such circumstances, Henney could have brought suit on the coupons, and the "arrangement" would be no defense as against him ; and

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we think it is equally unavailing as against the plaintiff, standing in Henney's shoes.

The court allowed interest upon the coupons from the time they were presented for payment, and of this, also, the defendant complains. It is settled by the current of American authorities that coupon bonds, and coupons, like those in the present case, are negotiable instruments, and that the coupons may be detached and negotiated separately by simple delivery. *Society for Savings v. City of New London*, 29 Conn. 174; *New London City Bank v. Ware River R. Co.*, 41 Conn. 542; 2 Daniel, Neg. Inst. par. 1509 *et seq.*; Tied. Com. Paper, pars. 473-478. The coupon may be outstanding and suit brought upon it even after the bond has been paid and satisfied. *National Exchange Bank v. Hartford, P. & F. R. Co.*, 8 R. I. 375. As the coupon may be thus detached from the bond, and by negotiation may thus become an independent claim, existing as well before as after the bond is paid, the general rule, founded in good sense, and supported by the very great preponderance of authority, is that interest, at least after demand of payment, is allowable upon overdue coupons. Tied. Com. Paper, par. 477, and cases cited; 2 Daniel, Neg. Inst. par. 1513, and cases cited. "Interest is recoverable upon coupons after their maturity; for being promissory notes, generally speaking, it is just that if not paid when due they should continue to draw interest by way of compensation for the damages incurred from the detention of the money. Interest upon overdue coupons is therefore recoverable, and should be computed at the lawful rate, without semiannual or other rests." Freeman's note to *Canal Co. v. Fisher*, 64 Am. Dec. 439, citing a great number of cases; *Whitaker v. Railroad Co.*, 8 R. I. 47; *National Exch. Bank v. Hartford, P. & F. R. Co.*, *Id.* 375; *Beaver Co. v. Armstrong*, 44 Pa. St. 63; *Trustees v. Lewis*, 34 Fla. 424, 16 South. 325. We see no good reason why this almost universal rule as to the allowance of interest upon overdue coupons, especially after demand of payment,

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should not apply in a case like the one at bar. The defendant upon this point relies upon *Rose v. City of Bridgeport*, 17 Conn. 243. That case was decided at a time (1845) when coupons and coupon bonds, so common today in the markets of the world, were just beginning to come into use, and the coupons in that case were quite different from the coupons in the present case. In that case the coupon itself contained no promise to pay the interest mentioned in it. It simply acknowledged that, on a named date, there would be due to the bearer half a year's interest on a certain bond, and that this would be payable on that date. The coupons were signed by an agent of the city,—an agent to acknowledge, but not to pay. In the case at bar the coupons declare expressly that the company will pay the bearer the interest at a certain bank on a certain day, and they are signed by the treasurer of the company. The decision in *Rose v. City of Bridgeport* proceeds in part at least, upon the view taken by the court concerning the nature of the coupons in that case. The coupons were not regarded as conferring any right of action at all upon the holder; they were mere certificates that a half year's interest would be due on the bond at the date specified; and, although payable to bearer, they were held to operate "only as an order or letter from the obligee requesting the interest upon the bond to be paid to another." The only obligation to pay interest was held to arise from the bond alone, and not from the coupon, and the action was regarded as an action upon the bond. Viewing the coupons in this light, the court regarded the action as one brought upon the bond to recover interest, as such, upon interest,—that is, compound interest, as such,—and held that, as the case then before it did not fall within any of the classes of cases in which compound interest was recoverable, the plaintiff was not entitled to compound interest. The principles applied in that case have little or no application to a case like the present. The coupons in this case are regarded by the law as negotiable instruments, and, for most purposes, as being

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entirely independent of the bond, and as conferring a right upon the holder, whoever he may be, to the sum of money mentioned in the coupon at the very day therein specified. Cases like this seem to fall, and to have been intended by the parties to fall, within the principle of the third rule laid down by JUDGE SWIFT in *Selleck v. French*, 1 Conn. 32, 33, rather than within the rules applied in *Rose v. Bridgeport*. The rule laid down by JUDGE SWIFT is this: "(3) Where there is a written contract to pay money or other thing on a day certain, and the contract is broken, then interest is allowed by way of damage for the breach, as in the case of notes and bills of exchange." We are not disposed to extend the doctrine applied in *Rose v. City of Bridgeport* to cases like the present. We are of opinion that the interest on the overdue coupons was properly allowed. There is no error. In this opinion the other judges concurred.

CENTRAL R. CO. OF NEW JERSEY

v.

SMALLEY.

(Court of Errors and Appeals of New Jersey, March 1, 1898.)

Accident at Crossing—Due Care by Drivers of Vehicles.—The duty to look and to listen before crossing a railroad includes the duty to do that which will make looking and listening reasonably effective. If there is a permanent obstruction to sight that would make danger invisible, and a transient noise that would make it inaudible, it is negligence to go forward at once from a place of safety to a place of possible danger. Prudence requires delay until the transient noise has abated, and hearing again becomes efficient for protection.

Same—Duty to Stop, Look and Listen—Obstructed View.*—The plaintiff drove by daylight along a highway in a northerly direction towards a railroad crossing that was guarded neither by gates nor by a flagman. He drove slowly, looked, and listened. His view of trains that might come from the west was cut off by a building,

*See note at end of case.

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and by a bank of earth, on which were a fence and bushes. A coal train, in plain sight, was moving west along the north track towards the crossing, which it passed over just before the plaintiff reached it; the caboose clearing the highway as he drove, without stopping, upon the south track. At the same instant, his horse was killed, his sleigh demolished, and he himself injured, by the engine of an east-bound passenger train, which, until it was upon him, by reason of the obstructions above mentioned, he could not see, and which he did not hear. *Held*, that it was error in the trial judge to deny a motion to nonsuit for contributory negligence.

(Syllabus by the Court.)

Error by defendant to supreme court. , *Reversed*.

A. A. Clark, for plaintiff in error.

A. H. Strong, for defendant in error.

ADAMS, J. This writ of error brings up a judgment rendered in the supreme court upon a verdict for the plaintiff in the Somerset circuit. It is necessary to
Case Stated. notice only the assignment of error that is directed against the refusal to nonsuit the plaintiff for contributory negligence. The evidence on behalf of the plaintiff presented this case: On the 11th day of January, 1893, at a few minutes past noon, the plaintiff was driving a one-horse sleigh, with bells, in a northerly direction, along Vosseller avenue, in Bound Brook, towards a crossing of the Central Railroad, which was guarded neither by gates nor by a flagman. On the west side of the avenue there was a building, and a bank of earth, with a fence and bushes upon it, which cut off the plaintiff's view of trains in that direction. A coal train in plain sight was moving west along the north track, towards the crossing. As the plaintiff reached the crossing, and drove upon the south track, which he did without stopping, the caboose of the coal train was just clearing the highway, and was distant from him only a few feet. As the horse came upon the south track, the engine of an east-bound passenger train struck and killed him, crushed the sleigh, and seriously injured the plaintiff. Several witnesses testified, negatively, on behalf of the plaintiff, that they did not hear any signal by bell or whistle from the engine of the east-bound train. The plaintiff himself

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testified that, by reason of permanent obstructions, he could not see the east-bound train until his horse was on the track. The evidence of Harvey Smalley and John C. Morris was to the same effect. The plaintiff further testified that he did not hear the east-bound train, and that he heard no bell rung or whistle blown. There was no express evidence to show how much noise the coal train made, or, indeed, that it made any noise; nor, under the circumstances, was such evidence necessary. The thing spoke for itself. The court will not ignore common experience. There is no reason to think that the physical conditions were exceptional, or that the phenomenon of an inaudible coal train was a feature of the situation. The conclusion is inevitable that this moving body was accompanied by the usual roar and rumble, which must have greatly hindered a person in its immediate vicinity from distinguishing other sounds.

The duty of a person who is about to cross a railroad track is to be prudent, to look and to listen, and to do the things that will make looking and listening reasonably effective. If the vision or hearing of such a person is limited by permanent obstructions or disturbances, he should for that reason be cautious. If his vision or hearing is limited by transient obstructions or disturbances, under circumstances which oblige him to rely on the sense thus limited, he should wait until it has again become efficient to warn him of peril. One sense, if well used, may give warning enough. To go on a railroad crossing in the way of a train which can be neither seen nor heard, but which would be either visible or audible except for some temporary hindrance to sight or hearing, is to be negligent. These are rules of good sense, and therefore of law. In *Merkle v. Railroad Co.*, 49 N. J. Law, 473, 9 Atl. 680, the plaintiff's intestate went into danger while permanent obstructions, as in this case, hindered his seeing, and the noise of his own load hindered his hearing. It was held that he

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Same Duty to Stop, Look and Listen—Obstructed View.

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contributed, by negligence, to the disaster that ensued, not in relying on one sense alone, for that was a necessity of the situation, but in advancing while circumstances within his own control made the only sense on which he could rely ineffective to protect him. In *Railroad Co. v. Ewan*, 55 N. J. Law, 574, 27 Atl. 1064, the plaintiff was held to have been negligent in going upon a railroad track while the noise and smoke of a train that had just passed deprived him temporarily of the power to see clearly and hear distinctly. The governing rule was thus declared by this court in *Railway Co. v. Block*, 55 N. J. Law, 605, 612, 27 Atl. 1067, 1069, in language immediately referring to impediments to sight, but equally applicable to impediments to hearing: "It may be generally said that, if obstacles temporarily intervene to prevent observation, reasonable prudence would dictate delay until such observation as is requisite has been made." The case under consideration appears to fall within the rule which these decisions define and illustrate. The plaintiff went forward into a danger which permanent obstructions made it impossible to see, and which a passing noise made it difficult to hear. The permanence of the obstructions to sight made hearing his best reliance. A few moments' delay would have given him the full benefit of it. In advancing at once while circumstances interfered with its efficient exercise, he acted with less prudence than the law exacts.

At the trial, which took place nearly four years after the accident, the plaintiff, by way of excuse for not understanding a question, testified that he was a little hard of hearing. He was then 34 years old. Injury to hearing was not enumerated, either by the plaintiff or by Dr. Davis, his physician, among the consequences of the injury. It is therefore natural to suppose that the plaintiff's hearing was not acute at the time of the accident. Deafness increases the obligation to be cautious. *Buttelli v. Railway Co.*, 59 N. J. Law, 302, 36 Atl. 700. As it is not quite clear that the plaintiff's disability existed on the day of the accident, no weight has been given to this consideration.

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The plaintiff is entitled to the benefit of an examination of the whole record, in order that the court may see whether the defect in his case was cured by subsequent proof. *May v. Railway Co.*, 49 N. J. Law, 445, 9 Atl. 688. Nothing appears to alter the conclusion that the motion to nonsuit the plaintiff for contributory negligence should have been granted. The judgment against the plaintiff in error is therefore set aside.

NOTE.

Crossings—Duty to Stop, Look and Listen—Obstructed View.—It is the duty of a traveller to look and listen before attempting to cross a railroad track, and especially at a crossing dangerous from its obstructed view, and at which, owing to circumstances, it is difficult to hear. *McBride v. Northern Pacific R. Co.*, 42 Am. & Eng. R. Cas. p. 146; *Chase v. Maine Cent. R. R.*, 6 Am. & Eng. R. Cas. N. S., p. 343; *Atchison, etc. R. Co. v. Powers*, (Kan. 1897), 8 Am. & Eng. R. Cas. N. S. p. 757.

Duty of Traveller to Stop Wagon and Listen.—In *Brady v. Toledo, Ann Arbor & N. M. R. Co.* (Michigan Sup. Ct., July 2, 1890,) 45 N. W. Rep. 110, it appeared that plaintiff drove a team attached to a lumber wagon towards a railroad crossing, with his back to an approaching train. Intervening objects obscured a view of the track so that he could not see the train until within a few feet of the crossing, and then only when it was a short distance from the crossing. A mill in the vicinity made considerable noise, and the wind was blowing in a direction to take the sound of a whistle from plaintiff. On reaching the crossing, the team hesitated, but plaintiff urged them across, and was struck by the train. He was thoroughly familiar with the crossing, and knew that the train was due. *Held*, that it was not sufficient that plaintiff looked and listened for the train as he drove along, but he should have stopped his wagon and listened. LONG, J., said: The following principles have been settled in this state as to the degree of care which one circumstanced as the plaintiff was must exercise in approaching and passing over a railroad track where it intersects with a highway. A person about to cross a railroad track is bound to recognize the danger, and to make use of the sense of hearing and sight to ascertain, before attempting to cross, whether a train is in dangerous proximity. If he neglects to do this, and ventures blindly upon the track, it must be at his own risk; and such conduct should be pronounced negligence by the courts, as matter of law. *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274. A person familiar with a railroad crossing, having been frequently over it, and knowing its location when approaching the same, is under the highest possible obligation to observe such precautions as are needful to avoid a collision; and failure so to do is contributory negligence that will prevent recovery for damages, if any accrue. *Haas v. Grand Rapids & I. R. Co.*, 47 Mich. 401, 8 Am. & Eng. R. Cas. 268. If a person approaches a

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railway crossing without reasonable caution and care, particularly when a fast train is due and approaching, and by reason thereof his team becomes unmanageable, goes upon the track, and injury results, there is such contributory negligence as will prevent recovery. *Rhoads v. Chicago & G. T. R. Co.*, 58 Mich. 263, 21 Am. & Eng. R. Cas. 659.

"A greater duty was imposed upon the plaintiff in the present case by the fact that he knew the crossing to be a dangerous one. He knew its condition, and that he would be unable to see the train until arriving at the crossing. He had no right to close his ears, and drive along without stopping, when he must have known that the noise of his wagon, and of the mill, would shut off the sound from the approaching train. But it appears that even after his horses reached the track, and hesitated, he then gave his attention to them, and urged them across, without giving any attention as to whether the train was coming or not. As the record is now presented, the plaintiff's own testimony shows such want of care that the jury should have been directed to return a verdict for the defendant."

It is the duty of a traveller before crossing a railroad track to make such use of his senses as a careful and prudent man would when so situated; and if such care and prudence require him to stop, or even get out of his vehicle, and lead his horse, or go ahead and view the track from the crossing, or beyond the obstruction, then he must do so. *Nicholas v. Erie R. Co.*, 41 N. Y. 525; *Hanover R. Co. v. Coyle*, 55 Pa. St. 396; *Rothe v. Milwaukee R. Co.*, 21 Wis. 256; *Butterfield v. Western R. Co.*, 10 Allen. (Mass.), 532; *Elkins v. Boston, etc., R. Co.*, 115 Mass. 190; *Chicago, etc., R. Co. v. Still*, 19 Ill. 499; *Steves v. Oswego, etc., R. Co.*, 18 N. Y. 422; *Ill., etc., R. Co. v. Ehert*, 74 Ill. 399; *Penn. R. Co. v. Werner*, 89 Pa. St. 59; *Penn. R. Co. v. Maryland*, 61 Md. 108; s. c. 19 Am. & Eng. R. Cas. 324; *Dolon v. Delaware, etc., Co.* 71 N. Y. 285.

It has been held in Pennsylvania that when the view is obstructed it is the duty of the traveller to get out and lead his horse, or go forward and look up and down the track; and that a failure to do so, if he could not otherwise see, would be negligence *per se*. *Reading, etc., R. Co. v. Ritchie*, 102 Pa. St. 425; s. c. 19 Am. & Eng. R. Cas. 267.

This doctrine, however, has been somewhat limited by other decisions in that state. *Philadelphia, etc., R. Co. v. Carr* (Pa. 1882), 6 Am. & Eng. R. Cas. 185; *Baughman v. Shenango, etc., R. Co.*, 92 Pa. St. 335; s. c. 6 Am. & Eng. R. Cas. 51.

Burnett v. Eastern & A. R. Co

BURNETT

v.

EASTERN & A. R. Co.

(*Supreme Court of New Jersey, Feb. 28, 1898.*)

Crossing in Front of Approaching Train—Contributory Negligence.*—A railroad company is not responsible for injuries received by a person who unsuccessfully attempts to cross the track in advance of a train which he knows is approaching the place of crossing.

(Syllabus by the court.)

ARGUED November term, 1897, before MAGIE, C. J., and DEPUE, GUMMERE, and LUDLOW, JJ.

Craig A. Marsh, for plaintiff.

Robert H. McCarter, for defendant.

GUMMERE, J. The plaintiff's intestate was killed by being run down by an engine and cars of the defendant company, while driving across the latter's tracks at Bound Brook. The defense set up was absence of negligence on the part of the railroad company or its employees, and contributory negligence on the part of the decedent. The trial justice, in his charge to the jury, used the following language: "You must determine another question, gentlemen. Assuming him [the decedent] to have stopped, or assuming him to have gone on cautiously, looking both ways, what could he have seen? * * * Now, gentlemen, if he could have seen these cars approaching, and did look and did see them, then, gentlemen, it will be for you to say whether he was prudent in undertaking to cross before the approaching train." It seems to me that it was error to leave it to the jury to say whether or not the decedent was prudent under the conditions mentioned. The jury should have been told that if the decedent

*See note at end of case.

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saw the train approaching, and, instead of waiting for it to pass, undertook to cross in advance of it, there could be no recovery against the defendant. As was said by the late VICE CHANCELLOR VAN FLEET in *Blaker's Ex'x v. Railroad Co.*, 30 N. J. Eq. 240: "A person intending to cross a railroad track is bound to look and listen for an approaching train; and if he sees or hears a train approaching, and then daringly assumes the hazard of attempting to cross in advance of it, and fails, he must bear the consequence of his folly." MR. JUSTICE FIELD, in the case of *Railroad Co. v. Houston*, 95 U. S. 702, which was somewhat similar to that before us, said that a person approaching a railroad crossing was bound to look and to listen, and that if, doing so, "he saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of his mistake and temerity cannot be cast upon the company. No railroad company can be held liable for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure." A number of cases to the same effect will be found collected in *Patt. Ry. Acc. Law*, § 176, in support of the rule laid down by the author that "a person is contributorily negligent who attempts to cross a railway when he sees or hears that a train is moving towards the crossing." Moreover, irrespective of the question of negligence in attempting to cross a railroad track in front of a train known to be near at hand, the very moment that it appears that the person injured had knowledge that the train was approaching the crossing, the nonliability of the railroad company for the injury is established. The only ground upon which it can be held responsible is that it failed in the discharge of a duty which it owed to the person injured, namely, the giving him timely warning of the approach of its train, and that by its failure it caused the accident which produced the injuries. But, if the injured person discovers for himself what the railroad company should have informed him of,—that its train was approaching

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the crossing,—it is quite clear that the negligence of the company, in failing to warn him, had no part in the bringing about of the accident. The rule to show cause should be made absolute, and a new trial granted.

NOTE.

Crossing in Front of Approaching Train—Contributory Negligence.—One who knowingly crosses the track of a street railway in front of a moving train, and so close as to be struck thereby before he could cross, is guilty of contributory negligence, and cannot recover, even if the motorman was negligent in not stopping the train. *Watson v. Mound City Street Railway Co.* 3 Am. & Eng. R. Cas. N. S. p. 385.

When the traveller knows of the immediate proximity of an advancing train, whether the warning be by signals or otherwise, and, having a safe and seasonable opportunity to stop, he voluntarily takes the risk of crossing in front of it, he is guilty of culpable negligence and forfeits all claim to redress. *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 32 How. Pr. 61, 3 Abb. Pr. N. S. 82; *reversing* 32 Barb. 159. *State v. Maine C. R. Co.*, 77 Me. 538, 1 Atl. Rep. 673. *Korrady v. Lake Shore & M. S. R. Co.*, 131 Ind. 261, 29 N. E. Rep. 1069. *Rigler v. Charlotte, C. & A. R. Co.*, 26 Am. & Eng. R. Cas. 386, 94 N. Car. 604.

Where a person about to cross a railroad track on a public highway is apprised of an approaching train by the noise, and ventures upon the track from a miscalculation of his danger, the error is his, and the company is not answerable for his erroneous calculation. *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335.

It is contributory negligence for an adult in the full possession of all his faculties, and familiar with the crossing and the movement of the cars, to attempt to cross a railroad in front of a moving engine in full view and within ten or twelve feet from it. *Baltimore & O. R. Co. v. Mali*, 28 Am. & Eng. R. Cas. 628, 66 Md. 53, 5 Atl. Rep. 87.

One in the full possession of his faculties who undertakes to cross a railroad track at the very moment a train of cars is passing, or when a train is so near that he is not only liable to be, but is in fact, struck by it, is, *prima facie*, guilty of negligence. *State v. Maine C. R. Co.*, 19 Am. & Eng. R. Cas. 312, 76 Me. 357, 49 Am. Rep. 622.

If one sees or hears an approaching train, he must wait for it to pass. If he cross before the train, unless compelled by an imperious necessity, his negligence is a presumption of law. *Myers v. Baltimore & O. R. Co.*, 150 Pa. St. 386, 24 Atl. Rep. 747. *Thomas v. Delaware, L. & W. R. Co.*, 19 Blatchf. (U. S.) 533, 8 Fed. Rep. 729.

One who stops at a point from which he cannot see the track, then proceeds, and seeing a train whips his horse and endeavors to cross, is guilty of such contributory negligence as to justify a nonsuit. *Allen v. Pennsylvania R. Co.*, (Pa.) 12 Atl. Rep. 493.

Ordinarily it is negligence in a person to attempt to cross in plain

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view of near and rapidly approaching train. *Chicago R. Co. v. Bell*, 70 Ill. 102; *Belfontaine R. Co. v. Hunter*, 33 Ind. 335; *State v. Maine Cent. R. Co.*, 76 Me. 357; s. c., 19 Am. & Eng. R. R. Cas. 312; *Baltimore & O. R. Co. v. Mali*, 66 Md. 53; s. c., 28 Am. & Eng. R. R. Cas. 628; *Swartz v. Hudson R. Co.*, 4 Robt. (N. Y.) 347; *Rigler v. R. Co. (N. C.)* 26 Am. & Eng. R. R. Cas. 386; *Bohon v. Milwaukee, L. & W. R. Co.*, 61 Wis. 391; s. c., 19 Am. & Eng. R. R. Cas. 276. The mere fact that the speed of the train is greater than usual or in violation of law will not excuse the party, *Kelley v. Hannibal & St. J. R. Co.* 75 Mo. 138, because where a person attempts to cross a railroad track in advance of an approaching train, and merely miscalculates his ability to do so in safety, there can be no recovery for a resulting injury. *Chicago R. Co. v. Fear*, 53 Ill. 115; *Belfontaine v. Hunter*, 33 Ind. 335; *Schwartz v. Hudson R. Co.*, 4 Robt. (N. Y.) 347.

There are cases in which it is not negligence as a matter of law to attempt to cross in front of an advancing train. See *Detroit & M. R. Co. v. Van Steinberg*, 17 Mich. 99; *Bonnell v. Delaware R. Co.*, 39 N. J. L. (10 Vr.) 189; *Aaron v. Second Avenue R. Co.*, 2 Daly (N. Y.), 127; *Baxter v. Second Avenue R. Co.*, 3 How. (N. Y.) Pr. 219; s. c., 3 Robt. (N. Y.) 510; *Langhoff v. Milwaukee R. Co.*, 19 Wis. 489.

See also note to *Durbin v. Oregon R. & N. Co. (Oreg.)* 32 Am. & Eng. R. R. Cas. 156.

SOUTHERN RY. CO.

v.

BLAKE.

(*Supreme Court of Georgia, May 20, 1897.*)

Crossing in Front of Moving Train—Contributory Negligence.*— Where, in an action against a railroad company to recover damages for personal injuries by the running of a locomotive and cars within the limits of a city, it appears that such locomotive and cars were running within the limit of speed lawfully prescribed by the city, and it also appears from the evidence of the plaintiff himself that, having previously seen the moving train approaching the crossing, he miscalculated the time in which he could safely cross, and placed himself on the track immediately in front of the moving locomotive, was caught by the pilot, and injured, such injury is directly attributable to the negligence and want of ordinary care on the part of the plaintiff, which bar his right of recovery.

ATKINSON, J., dissenting.
(Syllabus by the Court.)

*See *Burnett v. Easton & A. R. Co.*, (N. J.) *ante* and notes.

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ERROR by defendant from Whitfield county superior court. *Reversed.*

McCutchen & Shumate and *Shumate & Maddox*, for plaintiff in error.

Jones & Martin, for defendant in error.

LITTLE, J. The action was to recover damages from the railroad company for injuries to the person of the plaintiff, caused by a moving train at a public crossing in the city of Dalton. The jury returned a verdict for \$1,400 in favor of the plaintiff. A motion for a new trial made by the defendant was overruled, and, to that judgment of the court below, the defendant excepted.

One of the grounds of the motion is that the verdict is excessive in amount. While there may be some merit in this ground under the evidence, we are not disposed to disturb the verdict for that reason. The jury had better opportunities of judging the amount of damages sustained than we can have ; and, as the element of pain and suffering had to be considered by them, we will not say the amount as fixed is so grossly excessive as to warrant a rehearing for that cause.

Another ground set out in the motion for a new trial is that the court charged the jury in the language of the first paragraph of section 2224 of the Civil Code, in reference to the neglect of the engineer to blow the whistle of the locomotive on approaching the crossing, and to check the speed of the train as required. We think this charge was error, because the provisions therein contained are not applicable to street crossings within the corporate limits of cities, towns, and villages within this state, and should not therefore have been given to the jury. The proviso to this section of the Code is the law which governs the signals required to be given on approaching a crossing in towns and cities, but inasmuch as, after charging the law in respect to those signals required at crossings not in cities and towns, the judge necessarily qualified that portion of his charge by correctly giving the law which is appli-

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cable in cities and towns, we are of the opinion that the jury was not misled by the charge, and refuse to set aside the verdict for this error.

A further ground set out in the motion, which was overruled, is that the verdict is contrary to law, and without evidence to support it ; and, after a very careful consideration of the evidence found in the record, a majority of the court agree that, under the law governing cases of this kind, the evidence is insufficient to sustain any recovery on the part of the plaintiff. In arriving at this conclusion, our judgment is not rested on the fact that the weight and preponderance of the evidence is in favor of the defendant, but we put it upon the broader ground that the evidence of the plaintiff shows that the injury which he sustained was occasioned in such manner as negatives his right to recover.

As stated before, the injury occurred at a point in the city of Dalton where the railroad track of the defendant crossed one of the public streets of that city. There is no question of the perfect right of the plaintiff to use the street crossing for passing over the railroad tracks there situated at his will and pleasure. There is, on the other hand, no question of the right of the railroad company to cause its trains of cars to pass on its tracks over such crossing whenever it may be necessary for it to do so. In the exercise of these reciprocal rights, the law imposes a duty on the person crossing to use care and caution to prevent injury to himself, and upon the railroad company to use care and caution to prevent the infliction of any injury upon persons who may be passing over such crossing. Neither has the absolute right to the crossing to the exclusion of the other ; and, when an injury occurs,—and we have no reason to doubt they will occur, as they have in the past,—to ascertain which of the parties has violated the duties imposed becomes the underlying question in the case, and, when the fault is found, the liability is determined.

It would seem to be needless at this late day to enter into a discussion of the legal principles which control

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cases of this character. No confusion of the law applicable ought to exist, as our Code expressly declares that no person shall recover damages from a railroad company for injury to himself or property in the following cases: (1) Where such injury is done by his consent, or caused by his negligence. Civ. Code, § 2322. (2) If the plaintiff, by the exercise of ordinary care, could have avoided the consequences to himself caused by the defendant's negligence. Id. § 3830. It is also expressly provided, as the rule which governs a recovery for such injuries, that, if the plaintiff and the company are both at fault, the plaintiff may recover; but the damages shall be diminished in proportion to the amount of default attributable to the plaintiff. Id. § 2224, *supra*. These are familiar rules taken from our Code, and need no elaboration to be understood. Inasmuch, however, as a proper application of them settles the case at bar, we refer to some of the adjudicated cases where the distinctions between the principles stated have been drawn in their application to different classes of facts.

One of the earliest cases reported is that of Railroad Co. v. Winn, 19 Ga. 440, where this court said: "If a collision happen at a crossing of a railroad and a public highway, and both parties are negligent, and the plaintiff, in the exercise of common care and caution, could have avoided the injury, he shall not be entitled to recover of the defendant, notwithstanding [the latter] was also in fault." In the case of Railroad Co. v. Johnson, 38 Ga. 431, JUDGE McCAY, in delivering the opinion of the court, uses this language: "The man who neglects ordinary care to avoid an injury has no just right to seek redress if that injury is produced by the negligence of another, and I see nothing in the character of a railroad company which should subject it to damages for an injury caused by the neglect of its agents, when the person might, by the exercise of ordinary care, have avoided the consequence to himself. It is objected that this is a harsh rule, and it is even contended that, though in the Code, it is not law, be-

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cause beyond the power of the compilers, who were not authorized to make law. It is sufficient to say that both the constitutions of 1865 and 1868 adopted the Code. * * * Nor is this rule less harsh upon the defendant than the common law." The same principle is similarly adjudicated in the case of *Sims v. Railroad Co.*, 28 Ga. 93, and in the case of *Hendricks v. Railroad Co.*, 52 Ga. 467. In the case of *Railroad Co. v. Johnson*, 60 Ga. 667, where a widow had sued for the homicide of her husband, who was killed while lying on the railroad track where the public road crossed the same, and in which it was contended that the requirements of the statute on the part of the railroad company as to sounding the whistle of the locomotive and checking the train were not complied with, the court in its opinion uses this language: "The plaintiff in this case, according to the evidence, could by ordinary care have avoided the consequences to himself caused by the defendant's negligence, assuming that the defendant was negligent in not blowing its whistle at the proper time at the crossing of the public road, and checking up its train of cars;" and a verdict for \$1,000 which had been rendered for the plaintiff was set aside, and the judgment of the court in overruling the defendant's motion for a new trial was reversed, because of the applicability of the principle quoted above to the facts of the case. In the case of *Stiles v. Railroad Co.*, 65 Ga. 370, Hawkins, J., construing the sections of the Code to which we have referred *supra*, in delivering the opinion of the court, says: "It would seem no action can be maintained against a railroad company where the plaintiff could have avoided the injury complained of by the exercise of ordinary care, and this would be true where the injury complained of was caused by the negligent running of the locomotive or cars of the company;" and the ruling of the court below in granting a new trial and setting aside a verdict for \$1,000, which had been rendered for the plaintiff, was approved by the court. Similar rulings were made in the cases of *Railway Co. v. Stewart*, 71 Ga. 427; *Railroad Co. v.*

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Luckie, 87 Ga. 6, 13 S. E. 105; *Ivy v. Railroad Co.*, 88 Ga. 71, 13 S. E. 947. In the case last cited, it was held that, notwithstanding the train by which the plaintiff was injured was running too fast, and the bell was not rung in approaching the crossing, the injury did not take place at the crossing, but some distance beyond it, and did not result directly from the company's negligence, but from the sudden and unnecessary conduct of the plaintiff himself in stepping upon the track immediately in front of the train, and so nearly in front of the locomotive that it was impossible to avoid striking him after he put himself in a position of danger; and the judgment of the court below in granting a nonsuit on this state of facts was affirmed. In the case of *Railroad Co. v. Daniel*, 89 Ga. 463, 15 S. E. 538, a new trial was ordered, with direction to ascertain alone the fact whether the injured party could and would have avoided the negligence of the company by the use of that degree of diligence for his own protection which every prudent person uses who puts himself unnecessarily in a perilous position. The direction was to render judgment for the amount found, or dismiss the action according to the finding of another jury on this one question. See also, *Railroad Co. v. Williams*, 93 Ga. 253, 18 S. E. 825.

This is the law as we find it written. We are aware that the principles above announced are not new, nor in any way unknown; but we have preferred in dealing with this case to restate them, and demonstrate their correctness by a citation of repeated rulings of this court.

There was but little, if any, material conflict in the evidence, which tends to show that the train was moving about four miles an hour, and within the limit of the ordinance of the city at the time the plaintiff was injured. There does not seem to be any question but that the bell was being tolled, nor that the engine was stopped in a very short distance after the plaintiff was struck. Nor is the fact contested that the plaintiff stepped upon the track within a very few feet in front

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of the locomotive, which was in motion ; nor is the fact contested that it was then moving at such a slow rate of speed that the plaintiff was not thrown from the track, but was able to catch to the bars of the pilot, and was carried along with it. It also appears that when he approached the track on the fireman's side of the engine, on notice, the engineer reversed the engine and put on air brakes, and that the fireman endeavored, by hallooing and calling to the plaintiff, to prevent him from placing himself on the track, and that these cries were heard at considerable distance from the place where the plaintiff was struck. We recognize that these are matters of fact for the jury to consider ; and if there was any evidence whatever tending to show that the plaintiff had exercised any degree of care, or even if it was an open question as to whether the injury was caused by his own negligence, we would not disturb the verdict ; but we fail to find in this record any affirmative evidence which authorizes a verdict in favor of the plaintiff, and his own testimony rebuts the presumption which the law raises against the railroad company, and absolutely bars his right to recover under the law. We take from his evidence, as it appears in the record, certain statements which would prevent this court from sanctioning a verdict in his favor, because to us it conclusively appears that he could by the exercise of ordinary care—indeed, by almost any degree of care—have avoided the injury. In the course of his examination as a witness, and at different occasions while testifying on the stand, the plaintiff made these statements : “I might have avoided the accident by stopping. Did not think the train was running as fast as it was. It tripped me up. Did not break my leg. I rolled off on the west side of the track. I did not keep my eyes on the train when I first saw it. Did not look at it again, but walked right on to the track. I am not sure I knew the train was on that track, but knew it might be, and that there might be danger,—danger if it might be on that track. It would take only a few moments to walk 14 feet. I could have

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stepped off of the track in a second by making an effort. If I had known the train was within five feet of me, I could have gotten off of the track. If I had looked around, I could have seen it. I went across in a diagonal direction because it led in the direction that I wanted to go. There was nothing to prevent me from looking at the train from the time I saw it until it struck me. I could have done that. There was nothing to prevent me turning across the track if I had wanted to. If I had gotten off before the engine got there, I would not have been hurt. I judged it was not dangerous. I always bet on my judgment. I did not think the train that struck me threatened me with danger. I saw no other train about there that threatened me with danger." We have not attempted nor intended to give all of the testimony of the plaintiff which is contained in the record, but have only cited such parts of it as seem to us to demonstrate the proposition that he could have avoided the injury by the exercise of ordinary care. This evidence, without regard to the details of the injury otherwise testified to by the plaintiff, is wholly uncontradicted by any other witness. Indeed, parts of the above extracts from the plaintiff's evidence are, to a certain extent at least, supported by other witnesses. It is to doubt the meaning of plain words to have a doubt that this plaintiff, by the exercise of any degree of care for himself, could have avoided, not only the injury, but the negligence of the defendant, assuming it to have been negligent. To us his lack of care for himself seems to have bordered on recklessness. Invoking the principle of law which seems to us to rule the case, the plaintiff in error appeared in this court, and asked to have the verdict set aside, and a new trial granted, because the verdict rendered is contrary to law; and believing it to be so, for the reasons given, the judgment of the court below refusing to grant a new trial is reversed.

ATKINSON, J. (dissenting). 1. Where, in a populous city, at the intersection of a public street with the track of a railroad company, a person passing along such

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street is injured by a train of the railroad company, in consequence of the negligence of its servants in running one of its trains, in disregard of the law of the state, which requires the engineers of railroad trains, upon approaching public crossings, to check and keep checking their engines, in order to prevent injuries to persons being thereon, the company is liable in damages, even though it appears that, at the time of the infliction of the injuries complained of, the engine was not being run at a speed greater than that prescribed by the ordinance of such city.

2. Where the evidence as to the rate of speed at which the train was running was based upon the opinions only of the witnesses who testified with respect thereto, and such opinions are in conflict, the question as to whether the defendant's engine was being run at a speed greater than that allowed by the ordinance was one of fact, and should have been submitted to the jury.

3. Whether or not the negligence of the person injured amounted to an omission to take ordinary care for his own safety, or whether it was only a slight contributing cause, were questions of fact for a jury. In the former case he could not recover unless the negligence of the defendant company was wanton or amounted to a wilful act; in the latter, a case of contributory negligence, an apportionment of damages would arise. In either case the question of fact involved was one for a jury: and, there being evidence sufficient to support the verdict, the discretion of the trial judge in refusing a new trial should not be disturbed.

Chicago & W. I. R. Co. v. Ptacek

CHICAGO & W. I. R. Co.

v.

PTACEK.

(*Supreme Court of Illinois, Dec. 22, 1897.*)

Crossing before Approaching Train—Negligence Per Se—Question for Jury.*—An instruction requested to the effect that plaintiff could not recover, if the jury found that decedent was killed while trying to cross the tracks at a railroad crossing, after the gates were down, in front of an approaching train, was properly modified by the additional clause after the words "approaching train," "and that in so doing she was guilty of lack of ordinary care," such an attempt not being negligence per se but a question of fact.

Measure of Damages—Adult Children.—And in such action the pecuniary value of the benefit which accrued to the adult children of decedent from her life, where there is some evidence tending to show such benefit, is a matter to be determined by the jury, and finally by the appellate court; it not being necessary in such cases that exact pecuniary damages should be proved.

APPEAL by defendant from First district appellate court. *Affirmed.*

E. A. Bancroft and W. O. Johnson (Stirlen & King, of counsel), for appellant.

Jones & Lusk, for appellee.

WILKIN, J. This action was by appellee, as administrator of the estate of Rosalie Pruksa, against appellant, for negligently causing the death of his intestate. He obtained judgment in the trial court for \$3,000 and costs of suit, and that judgment was affirmed in the appellate court. The principal question discussed and decided in the appellate court was whether or not the damages were excessive. That, together with all other controverted questions of fact being settled there, it only remains for us to determine

Case Stated.

*See note at end of case.

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whether any of the errors of law assigned upon the record were committed by the trial court.

Upon the trial, appellant asked the court to instruct the jury that if, at the time plaintiff's intestate came to the railroad crossing at which she was killed, the gates were down, and she disregarded that fact, and went upon the crossing, endeavoring to cross over the tracks in front of an approaching engine, plaintiff could not recover. But the court modified it by adding, after the words "approaching train", "and that in so doing she was guilty of lack of ordinary care," and this modification is assigned for error. It is not denied that the question as to whether certain acts amount to negligence is, as a general rule, one of fact; but it is contended that in this case the acts mentioned in the offered instruction are such acts of negligence as leave no reasonable ground for doubt in the conclusion of reasonable minds, and therefore the court erred in refusing to submit it to the jury as a matter of law. In support of this position the cases of *Hoehn v. Railway Co.*, 152 Ill. 223, 38 N. E. 549, and *Railway Co. v. Brown*, 152 Ill. 484, 39 N. E. 273, are cited. In the former of these cases we said: "Negligence is generally a question of fact. * * * There is, however, this exception to the rule that the court may not properly say to the jury that negligence has been established as a matter of law: If the conduct of the party charged with negligence, or whose duty it is to use due care, is so clearly and palpably negligent that all reasonable minds would so pronounce it, without hesitation or dissent, then the court may so pronounce it by instructions to the jury." While it is doubtless true that all reasonable minds will agree that to attempt to cross a railroad track in front of an approaching train, the gates being down, is ordinarily an act of gross negligence, yet we apprehend that the attempt might be made under circumstances where it would not necessarily be negligent. The distance of the approaching train from the crossing, and the speed at which it was moving, would certainly

Crossing before
Approaching Train
—Negligence per se
—Question for Jury.

be very material facts in determining the question of due care. It cannot be said that every person who attempts to cross a railroad track upon a street in front of an approaching train when the gates are down is guilty of negligence *per se*; and while, as we have said, it is generally an act of imprudence, yet, if it is done under such circumstances as show that ordinary care is being exercised, a right of recovery for negligence on the part of those in charge of the engine is not barred. We think it was not error to refuse the instruction asked, and the modification of it was not improper. The court could not, under all the facts proved, be required in this way to take the question of negligence from the jury.

It is next insisted that the court erred in refusing to instruct the jury to return a verdict for nominal damages, only, in case they found the defendant guilty. As we have already said, the question as to whether the damages awarded by the jury, under all the facts proved are excessive, is one peculiarly within the province of the appellate court to determine. We cannot say, as a matter of law, that plaintiff was not entitled to recover substantial damages. Whether he was or not can only be determined by reviewing the evidence, and determining its weight as establishing or failing to establish the facts which go to the question of damages. The court did instruct the jury on behalf of the plaintiff that, if from the evidence, under the instructions of the court as to the law, they found the defendant guilty, they should assess the plaintiff's damages at such a sum as they deemed fair and just compensation, with reference only to the pecuniary injuries, if any, resulting from the death of the deceased to her next of kin, not exceeding the sum of \$5,000. That instruction, as we understand it, announced the correct rule as to the measure of damages, and properly left the jury to find the facts from the evidence. Conceding the relationship between the deceased and her children was such as no pecuniary interest in her life would be presumed, they being adults,

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yet there is certainly some evidence tending to prove that the children derived a benefit from her life. The pecuniary value of that benefit was a question for the jury, and finally for the appellate court, and so both parties treated the case by their instructions. Defendant cannot complain of plaintiff's similar instructions. In this class of cases it is not necessary that damages be proved in dollars and cents, but having proved such kinship as raises a presumption of pecuniary loss, or offered proof of loss in cases of collaterals or adult children, the jury must, from age, health, etc., fix the damages sustained. No error appearing in the record in this cause, the judgment of the appellate court will be affirmed. Affirmed.

NOTE.

Crossing before Approaching Train—Negligence Per Se.—See *Burnett v. Easton & A. R. Co.*, (N. J.) *ante*, and *note*.

It is not negligence *per se*, to cross a track in front of an approaching train. When there is ample time, it is the daily practice of prudent men to do so. *Thomas v. Delaware, L. & W. R. Co.*, 19 Blatchf. (U. S.) 533, 8 Fed. Rep. 729.

It has never yet been announced as negligence *per se* to cross a railroad track in a public highway either in the front or rear of a standing engine and tender; and whether it is negligence to turn one's back upon the rear of such engine and tender, and take a few steps away from them (walking between the tracks), seems to depend upon the circumstances of the particular case; and, if so, the determination of the question is for a jury. *Fehnrich v. Michigan C. R. Co.*, 87 Mich. 606, 49 N. W. Rep. 890.

As plaintiff was about to cross a street he saw a car approaching and behind it a cart moving still more rapidly. He testified that he "calculated" that he could pass in front of the car "before the cart could get up;" but the facts showed that he miscalculated and was struck by the cart. *Held*, in an action against the owner of the cart, that it was negligence *per se* to attempt to so cross, and he could not recover. *Belton v. Baxter*, 54 N. Y. 245, 14 Abb. Pr. N. S. 404; *reversing*, 1 J. & S. 182.

McCanna v. New England R. Co

McCANNA

v.

NEW ENGLAND R. CO.

(*Supreme Court of Rhode Island, March 29, 1898.*)

Accident at Crossing — Contributory Negligence — Proximate Cause.*—A person who attempts to drive across a railroad track before exercising reasonable care in stopping, looking and listening is guilty of negligence, and if injured while making such attempt, his contributory negligence is the proximate cause of the accident.

Page & Page and *Arthur Cushing* for plaintiff.

James M. Ripley and *John Henshaw*, for defendant.

TILLINGHAST, J. This is an action of trespass on the case for negligence. It was tried in the common pleas division, and resulted in a verdict for the plaintiff for \$500, and the defendant now petitions for a new trial on the grounds (1) that the verdict was against the evidence and the weight thereof, and (2) that the verdict was against the law. The injuries complained of were received by the plaintiff on the 9th of October, 1895, at about four o'clock in the afternoon, at a railroad crossing on the main road between East Blackstone Mass., and Woonsocket, R. I., in the following manner: The plaintiff, who is an undertaker, had been to a burying ground with a funeral, and was returning along said road to Woonsocket, driving a one-horse hearse, and when he reached the point where the road crosses the railroad at grade, his horse, which was a spirited one, became unmanageable by reason of the approaching train, and, despite the efforts of the plaintiff to control him, plunged forward, and ran into the rear part of the third car of the limited express train running from Boston to Willimantic. The train was a regular one,

*See note at end of case.

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and was on time when the accident occurred. The hearse was overturned and the plaintiff was thrown to the ground and injured by the collision, and the horse was so badly injured that he afterwards died in consequence thereof. The evidence shows that a person approaching said crossing from the direction in which the plaintiff was approaching it would have an unobstructed view of the railroad for a considerable distance until he gets near to the crossing, when a hill or bank, covered with trees and shrubbery, would shut off his view until he comes near to said crossing. The plaintiff's declaration alleges negligence on the part of the defendant (a) in its failure to blow the whistle; (b) in its failure to ring the bell; (c) in its failure to maintain any gate or flagman at said crossing; and (d) in its failure to give any warning or signal whatever that its locomotive and train were approaching said crossing. The plaintiff was perfectly familiar with the crossing, and had been over it five times before, the same day. He testified that he was looking out for any train that might come along; that he was listening, with his head inclined to the left, and that the first he knew of the approach of the train was when he heard the whistle blow, he then being about 70 feet from the track; that he then gathered up the slack reins, and tried to stop his horse, but could not, as it threw up its head, and made a plunge forward, striking the third car, as aforesaid. On cross-examination plaintiff testified that he was trotting his horse right along until he got within 60 feet or so of the crossing, trying to listen at the same time "with one ear," and that as he could not hear anything, there was no occasion for him to stop; that, the first he knew, he heard the whistle, and then it was too late to pull up; that, if he had heard the train coming, he would have stopped, but, not hearing it, he did not stop. He further testified that his carriage rattled along, making some noise, while he was trying to listen as aforesaid, and that a hack was being driven just behind him. The plaintiff offered no testimony except his own in support of his case.

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It is very clear that upon such testimony as this the plaintiff has no legal claim against the defendant. In attempting to cross the railroad in the manner above stated, he was guilty of gross negligence. He was evidently driving with a slack rein. He did not stop, or even slacken the speed of his horse ; and, according to his own testimony, the only listening which he did—if, indeed, it can be said that he listened at all, within the fair and practical meaning of the term—was of such a perfunctory sort as to be of no avail. The fact that his view of the track was obstructed was not only no excuse for his attempting to cross the same without observing the customary rule, but rendered its observance, in so far, at least, as stopping and listening were concerned, all the more necessary and imperative. The further fact that he was driving a spirited horse also called for the exercise of a higher degree of care than would otherwise have been required, the well-understood rule everywhere being that the degree of care to be exercised in a given case must be commensurate with the degree of danger. Moreover, the duty to look and listen before crossing a railroad track at grade requires the traveler to select a position, if practicable, from which an observation can be made ; that is to say, “he must exercise care to make the act of looking and listening reasonably effective”. 3 Elliott, R. R. § 1166 ; Patt. Ry. Acc. Law, 171, and cases cited. Had the plaintiff stopped and listened at a reasonable distance from said crossing, in the circumstances of the case, as it was clearly his duty to have done, and as even a modicum of common sense and common prudence would seem to have dictated. no harm could have befallen him. Having failed to observe such a simple and reasonable precaution, the law can afford him no redress. In the case of *Pepper v. Pacific Co.*, 105 Cal. 389, 38 Pac. 974, cited by defendant, the court say : “If he could not see an approaching train because his vision was obstructed, ordinary care for his own safety required him to stop, in order that his hearing should not also be obstructed; and, in

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any event, to make his approach so slowly as to give him complete control of his team, and enable him to stop instantly if occasion required". In *Chase v. Railroad Co.*, 167 Mass. 383, 45 N. E. 911, the court state the rule as follows: "The general rule in this commonwealth undoubtedly is that, as a railroad crossing is a dangerous place, a traveler on the highway is bound to make a reasonable use of his sense of sight as well as of hearing, in order to ascertain whether he will expose himself to danger; that, if he fails so to use his senses, without reasonable excuse, he fails to use reasonable care; and that the burden is on the plaintiff to show such care, even though the defendant is in fault. So, too, it may be said to be a general, although not a universal, rule that, if there is anything to obstruct the view of a traveler on the highway at a crossing at grade, it is his duty to stop until he can ascertain whether he can cross with safety." To the same general effect are *Littaur v. Railroad Co.*, 61 Fed. 591, *Rhoades v. Railroad Co.* (Mich.) 25 N. W. 182, and *Chase v. Railroad Co.*, 78 Me. 353, 5 Atl. 771, cited by defendant. It is true, as suggested by plaintiff's counsel, that in *Ormsbee v. Railroad Co.*, 14 R. I. 102, this court held, in substance, that the rule requiring a traveler to stop and look and listen before attempting to cross a railroad was subject to certain exceptions, one of which is that, where the view of the track is so obstructed that the traveler is unable to see up and down the same as he approaches it, he is obliged to act upon his judgment at the time as to what precaution he shall take; that is, that where compliance with the rule is impracticable or unavailing, he is excused from observing it. We approve of the doctrine thus enunciated. Of course, the rule is, and must necessarily be, subject to exceptions, as, indeed, what rule of law or of human conduct is not? If looking or listening, or both, should, for some reason, be rendered unavailing and useless, then the law would excuse the traveler therefrom, as it never requires the performance of a useless or futile act. So, again, as said in the Orms-

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bee Case, "where the direct act of some agent of the company had put the person off his guard, and induced him to cross the track without precaution," this would excuse the traveler from observing said rule. These exceptions, however, furnish no support to the plaintiff's case; for, while his view was obstructed in manner aforesaid, yet there was evidently nothing which interfered with his hearing the approaching train, except the noise made by his own carriage, and perhaps that of the hack in his rear; and there can be no doubt whatever that, if he had stopped and listened, he would have heard the approaching train. As it is clear, therefore, that the plaintiff's own negligence was the proximate cause of the injury, there is no occasion for us to consider the alleged negligence on the part of the defendant, or to consider the evidence offered by it in the case. Petition for a new trial granted.

NOTES.

Railroad Crossings—Duty of Traveler to Stop, Look and Listen.—It is the duty of a traveler in the full enjoyment of his faculties of hearing and seeing upon a highway approaching a railroad crossing, before he attempts to pass or drive over, to exercise a proper degree of care and caution, and to make a vigilant use of his eyes and ears for the purpose of ascertaining whether a train is approaching; and if by a proper use of his faculties he could have discovered the approach of a train and so have escaped injury, and fails to do so and is injured, he is chargeable with contributory negligence, and cannot maintain an action against the company. *Salter v. Utica & B. R. R. Co.*, 75 N. Y. 273; *reversing* 13 Hun 187. *Georgia Pac. R. Co. v. Lee*, 92 Ala. 262, 9 So. Rep. 230. *Lang v. Holliday Creek R. & C. M. Co.*, 49 Iowa 469. *Chicago, M. & St. P. R. Co. v. Wilson*, 42 Am. & Eng. R. Cas. 153, 133 Ill. 55, 24 N. E. Rep. 555; *Clark v. Missouri Pac. R. Co.*, 35 Kan. 350, 11 Pac. Rep. 134. *Wichita & W. R. Co. v. Davis*, 32 Am. & Eng. R. Cas. 65, 37 Kan 743, 16 Pac. Rep. 78. *Wright v. Boston & M. R. Co.*, 2 Am. & Eng. R. Cas. 121, 129 Mass. 440. *Mynning v. Detroit L. & N. R. Co.*, 28 Am. & Eng. R. Cas. 665, 64 Mich. 93, 31 N. W. Rep. 147. *Fusili v. Missouri Pac. R. Co.*, 45 Mo. App. 535. *Blaker v. New Jersey Midland R. Co.*, 30 N. J. Eq. 240, 18 Am. Ry. Rep. 81. *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358. *Wilds v. Hudson River R. Co.*, 24 N. Y. 430, 23 How. Pr. 492; *reversing* 33 Barb. 503; *Cleveland, C., C. & I. R. Co. v. Elliott*, 28 Ohio St. 340. *Cleveland, C. & C. R. Co. v. Crawford*, 24 Ohio St. 631, 7 Am. Ry. Rep. 172. *North Pa. R. Co. v. Heileman*, 49 Pa. St. 60. *Hughes v. Galveston, H. & S. A. R. Co.*, 34 Am. &

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Eng. R. Cas. 66, 67 Tex. 595, 4 S. W. Rep. 219. Galveston, H. & S. A. R. Co. v. Bracken, 14 Am. & Eng. R. Cas. 691, 59 Tex. 71. Beyel v. Newport News & M. V. R. Co., 45 Am. & Eng. R. Cas. 188, 34 W. Va. 538, 12 S. E. Rep. 532.

And this rule applies although the railroad company fails to give the proper cautionary signals. Damrill v. St. Louis & S. F. R. Co., 27 Mo. App. 202.

Accidents at Crossings.—See 7 Am. & Eng. R. Cas., N. S., a. 532, *et seq.*, 5 *Id.* a. 183; 2 Am. & Eng. R. Cas. a. 226 *et seq.*; and 35 *Id.* 335 *et seq.*

ELLIS

v.

BOSTON & M. R. R.

(*Supreme Judicial Court of Massachusetts, Nov. 24, 1897.*)

Accident at Railroad Crossing—Contributory Negligence.*—Plaintiff attempted to cross the street at a railroad crossing after the gates were raised, immediately in the rear of a departing train, which obstructed his view of the opposite tracks, and was injured by one of defendant's trains, which was backing from the direction taken by the other train. There was no signal given by the backing train; but plaintiff knew the crossing was the busiest in the city of Boston, and used no care or watchfulness in making such attempt. *Held*, that it was no error to direct a verdict for defendant.

EXCEPTIONS by plaintiff from Suffolk county superior court.—*Exceptions overruled.*

Samuel W. Culver and *Walter M. Lindsey*, for plaintiff.

Soloman Lincoln and *Thomas Hunt*, for defendant.

BARKER J. Upon the evidence, there was no dispute as to how the plaintiff was hurt. He stood upon the street, upon one side of the railroad, intending to walk upon the street to the other side of the railroad. There were the usual gates, which were down, and a passenger train stood upon the rails next him. The train moved on, and, when its rear end had left half of the width of the street free, the gates rose,

*See note at end of case.

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and he started across the railroad. He passed the track which the train had left, and, when he stepped upon the other track, was struck by an engine and tender, backing down upon that track, and moving in the opposite direction from that of the passenger train. He was himself a brakeman upon another railroad, and was perfectly familiar with the crossing; knew that the place was one of the busiest on the two great railroads entering Boston from the north, that a very large number of trains crossed there, and that engines and tenders were likely to go by there at almost any time. The evidence upon which the verdict against him was ordered consisted wholly of his own testimony, and that of another man, who was upon the railroad not far from the street, and who saw the plaintiff waiting to cross, and as he was struck. So far as the question of the plaintiff's conduct is concerned, the whole evidence was consistent; and there was no conflicting testimony to require the interposition of a jury. The plaintiff's whole account of the matter was that, after the passenger train had started, he started across, when the gates rose, and, as he got right on the inbound track, was struck, and did not remember anything until he was over at the depot, when he came to, and was taken to the hospital. On cross-examination he said he did not notice the gates on the further side of the street, and could not say whether they were open, or up or down, and did not look; that he did not look down on the ground as he walked across the tracks; that he started to go across when the rear car had got about midway across; and that the next thing he knew he was hit. He did not testify to any thought as to his own safety in crossing, or to any act of observation as to whether or not anything was coming towards him upon the inbound track, or that he looked or listened for anything, or that he exercised any care or watchfulness whatever, or did anything whatever to protect himself from danger. At the same time, he knew all about the crossing, that it was a very busy one, and that cars might be expected at any time. Nor can there be found

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from the testimony of the other witness any indication that, after the plaintiff started to cross, he exercised any care whatever. The witness saw him standing three or four feet outside the gates before the passenger train moved out; then saw him start to walk across, and saw him hit, so quickly that the witness had no time to halloo or give warning. The same witness estimated the speed of the engine at from nine to fourteen miles an hour, and testified that no whistle was blown and no bell rung.

The raising of the gates was, no doubt, a circumstance which justified the plaintiff in starting to cross the railroad when he did, and he had a right to expect that, if any engine or train was approaching the crossing on the inbound track, a whistle would be sounded or a bell be rung. But, in attempting to cross the railroad, he was bound, in the exercise of ordinary care, to himself exercise his own powers of observation, and to take thought for his own safety; and he was not entitled to have his case go to the jury unless there was evidence from which it could be inferred that he did this. No such inference can be drawn either from his own testimony or that of the other witness. The general rule that one who attempts to cross a railroad track must reasonably use his own powers of observation to assure himself that there is no danger from approaching trains is clear (*Chase v. Railroad Co.*, 167 Mass. 383, 45 N. E. 911, and cases cited); and the rule applies to one from whom a train approaching upon a second track is hidden by a train which has just passed (*Bancroft v. Railroad*, 97 Mass. 275; *Winslow v. Railroad*, 165 Mass. 264, 42 N. E. 1133). While the raising of the gates justified the plaintiff in attempting to cross when he did, and, while that fact and the facts that no whistle was sounded and no bell was rung are to be taken into consideration on the question of how much he must himself look and observe as he makes his way across, these circumstances do not excuse him from looking and listening and taking thought for his own safety. He cannot rely wholly upon them, and cannot recover

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without showing more, as to his own conduct, than that he so relied. *Butterfield v. Railroad Co.*, 10 Allen, 532; *Merrigan v. Railroad*, 154 Mass. 189, 28 N. E. 149; *Tyler v. Railroad Co.*, 157 Mass. 336, 32 N. E. 227. We are of opinion that, as matter of law, there was no evidence from which it could be found that the plaintiff himself exercised due care, and the verdict for defendant was rightly ordered. Exceptions overruled.

NOTE.

Crossings—Collision with a Second Train Immediately after One Has Passed.—A person who started to cross a double-track railroad immediately after the passage of one train without looking for the approach of another, was guilty of negligence contributing to injuries sustained by being run down while attempting to cross, especially where the gates upon the highway were down, and the train which struck him approached slowly with the brakes set, preparatory to stopping, and must have been observed if any watch had been kept for it. *Allerton v. Boston & M. R. Co.*, 34 Am. & Eng. R. Cas. 563, 140 Mass. 241, 5 N. Eng. Rep. 825, 15 N. E. Rep. 621.

Where a person walking on a public-street comes to a crossing while a north-bound train is passing on the further track, and just as soon as or even before it has completely passed starts to cross the nearer track, and either stands or walks near enough to be struck by a south-bound train, recovery is barred by contributory negligence. *Schmidt v. Philadelphia & R. R. Co.*, 149 Pa. St. 357, 24 Atl. Rep. 218.

It may not be negligence—that is, a degree of negligence which shall deprive a party of damages—to cross a track immediately after a train has rapidly passed with much noise and ringing of bells, although another train, giving no signal of its approach, may be noiselessly approaching from an opposite direction on a contiguous and parallel track. *McGrath v. Hudson River R. Co.*, 19 How. Pr. (N. Y.) 211, 32 Barb. 144.

The deceased waited until a train had passed so as to leave an unobstructed view of the track for a sufficient distance to authorize a jury to find that a person of reasonable caution might believe that the tracks were free, and that it was safe to attempt to cross. *Held*, in action for being struck by a train passing in the opposite direction, that contributory negligence was not imputable to him. *Puff v. Lehigh Valley R. Co.*, 71 Hun (N. Y.) 577.

Plaintiff was injured at a street crossing. The evidence showed that a long train of cars was passing in the opposite direction and making a great deal of noise, which tended to show that if the bell was rung on the train injuring him it could not be heard, and that a view of the approaching train was cut off. *Held*, that he could not be charged with negligence in failing to see or hear the train. *Leonard v. New York C. & H. R.R. Co.*, 10 J. & S. (N. Y.) 225.

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When a train has passed a crossing within the view of a person intending to pass over it, under such circumstances that he has no reason to expect the approach of any train from the direction in which such train went, the rule which requires persons approaching a crossing to look and listen for the approach of a train has no application, if such person was killed or injured by the backing of such train without warning. *Duame v. Chicago & N. W. R. Co.*, 35 Am. & Eng. R. Cas. 416, 72 Wis. 523, 7 Am. St. Rep. 879, 40 N. W. Rep. 394.

A person approaching a crossing with a team, and having reason to suppose that a regular passenger train has recently passed from one direction, is not guilty of negligence if he fails to look constantly in that direction, especially when it would be impossible to see or hear an approaching train because of an embankment or other obstruction to sight and sound. *Bower v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 301, 61 Wis. 457, 21 N. W. Rep. 536.

Where a person familiar with the surroundings attempted to cross a track upon the sidewalk, after seeing a train pass over it, and was run over and killed by detached cars which were following said train, it was for the jury to say whether he took that care and caution under all of the surrounding circumstances that a prudent man, exercising ordinary care and caution, should have exercised. *Breckenfelder v. Lake Shore & M. S. R. Co.*, 79 Mich. 560, 44 N. W. Rep. 957.

The evidence showed that plaintiff's intestate approached the tracks from the west, when one train was going south on a down grade with steam on, and without giving signals or carrying a headlight, and another train was going in the opposite direction, carrying a light and ringing a bell and the engine exhausting steam. The intestate was found a little south of the street line with wounds on his left side. *Held*, (1) that the question of his contributory negligence was properly submitted to the jury; (2) that the evidence was not sufficient to conclusively show that he was struck when south of the street line. *Smedis v. Brooklin & R. B. R. Co.*, 8 Am. & Eng. R. Cas. 445, 88 N. Y. 13; *affirming* 23 Hun. 279.

The intestate had a right to go on the track south of the crossing, so long as it was on the street; and if there was no want of care on his part, and the company was negligent while he was there, the plaintiff could recover. *Smedis v. Brooklin & R. B. R. Co.*, 8 Am. & Eng. R. Cas. 445, 88 N. Y. 13; *affirming* 23 Hun. 279.

Where plaintiff waited at a crossing for an approaching train going east to pass, and immediately upon its passage attempted to cross the track, and was struck by a train going west and severely injured—*held*, to be such contributory negligence as would bar a recovery, it appearing that the track was perfectly straight, and a view of it for a long distance either way was in no way obscured, and that plaintiff was familiar with the crossing and knew that trains going either way with great rapidity might be expected at any moment. *Benson v. Chicago & N. W. R. Co.*, 41 Ill. App. 227.

Plaintiff, who was driving a heavy team of gentle horses, stopped near a track where his view one way was obstructed by a building, to allow a train to pass, approaching from the opposite direction, and as soon as it passed went upon the track and was struck by a train going in the opposite direction. *Held*, that he was guilty of contributory negligence. *Fletcher v. Fitchburg R. Co.*, 149 Mass. 127, 3 L. R. A. 743, 21 N. E. Rep. 302.

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Plaintiff, who was driving, stopped to allow one train to pass, but was struck in crossing the track by a train running rapidly on another track. There was evidence to the effect that the bell was not rung until the train was very near the crossing, and it was then too late to be useful. *Held*, sufficient to authorize the jury in finding that the plaintiff exercised due care. *Stott v. New York, L. E. & W. R. Co.*, 50 N. Y. S. R. 500, 66 Hun 633, mem., 21 N. Y. Supp. 353.

Plaintiff waited at a crossing until a train passed and then, in attempting to cross, was struck by another train running in the opposite direction. There was nothing to prevent her seeing the train striking her, except the smoke from the other train. *Held*, that the company was entitled to a nonsuit on the ground of contributory negligence. *Whalen v. New York C. & H. R. R. Co.*, 40 N. Y. S. R. 566, 61 Hun 623, 15 N. Y. Supp. 941.

A person driving a team stopped at a crossing to allow a train to pass, and immediately upon its moving off the crossing the gatekeeper raised the gate and signaled him to cross. The approach to the track was on a down grade and the view obstructed. *Held*, that he was not negligent in proceeding across the track at a trot, or in failing to act with the best judgment when he found himself in imminent danger from an approaching train. *Bond v. N. Y. C. & H. R. R. Co.* 23 N. Y. Supp. 450, 52 N. Y. S. R. 637, 69 Hun. 476.

While plaintiff with a team was approaching the place where defendant's track crossed the highway, she observed a passenger train pass, but did not expect any other train at that time, although she had seen a freight train standing on the track, headed that way, in the town she had just left. The railroad at that point cuts through a hill, so as to obstruct the view from the wagon road. Plaintiff had passed the crossing many times before and was familiar with it. She had always used great care in looking for trains, but on this occasion she did not stop to look or listen. Her team came into collision with a passing engine and she sustained considerable damage. *Held*, that the plaintiff was guilty of contributory negligence. *Durbin v. Oregon R. & N. Co.*, 32 Am. & Eng. R. Cas. 149, 17 Oreg. 5, 11 Am. St. Rep. 778, 17 Pac. Rep. 5.

It appeared that the plaintiff, in attempting to cross the track, was struck by a car of a freight train which had been separated from the rest of the train for the purpose of making a running switch. The plaintiff's evidence tended to show that she was driving with care, and in approaching the crossing saw a train pass, but saw no flagman and received no warning that another car was coming. At a point forty-six feet from the crossing she could have seen along the track forty-six feet in the direction from which the car came; at thirty feet from the crossing she could have seen the track for more than a half a mile, but she did not look in that direction from those points, and gave as a reason therefor that she did not suppose that one train would follow another so closely. *Held*, that the question whether the plaintiff was in the exercise of due care was for the jury. *French v. Taunton Branch R. Co.*, 116 Mass. 537, 7 Am. Ry. Rep. 460.

Where a girl, just after the passage of a train, attempted to cross a track and was injured by a train approaching from the opposite direction without sounding the whistle or ringing the bell, the question as to her contributory negligence should be allowed to go to the

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jury, and it is improper for the court to order a nonsuit. *McGrath v. Hudson River R. Co.*, 19 How. Pr. (N. Y.) 211, 32 Barb. 144.

Plaintiff, a girl sixteen years old, was passing along a street in the city of Buffalo, going south, across defendant's tracks (five in number). She had crossed two of these tracks. She looked both ways and saw a train approaching from the east, on the fifth track. She stopped for this train to pass, standing between the second and third tracks, within about a foot of the third. She had been standing thus a short time, and about as the train passed which she was watching, was struck and injured by the tender of a locomotive backing up from the west, on the third track, which gave no warning, by ringing a bell or sounding a whistle, of its approach. Plaintiff was nonsuited at the circuit on the ground of contributory negligence. *Held*, error; that the question was one of fact for the jury. *Haycroft v. Lake Shore & M. S. R. Co.*, 64 N. Y. 636; *affirming* 2 Hun 489, 5 T. & C. 49.

Plaintiff approached a village crossing at dusk when two trains were passing, going in opposite directions. She waited until the one nearest to her had passed the crossing, and upon stepping on the track was struck by a hand-car which was following the train without lights or signals. The crossing was not lighted and there was nothing to enable one to see the hand-car. *Held*, that the question of contributory negligence was for the jury. *Suiter v. New York, L. E. & W. R. Co.*, 7 N. Y. S. R. 687, 44 Hun. 627.

Plaintiff approached a familiar crossing in the evening, where there were several tracks but no flagman. He stopped on one track to allow a train on another to get out of the way and was injured by a second train running without signals. He testified that he did not know the main tracks on which the regular trains ran. *Held*, that the facts did not disclose contributory negligence as a matter of law. *Blaiser v. New York, L. E. & W. R. Co.*, 110 N. Y. 638, mem., 17 N. E. Rep. 692, 17 N. Y. S. R. 145, 13 Cent. Rep. 231.

Plaintiff stood at a crossing on a dark night where there were several tracks until a train passed, and then was struck by a train going in the opposite direction as he was crossing. The first train passing made considerable noise, and there was a conflict of evidence as to whether the statutory signals were given by the second train. The second train carried a head light, but there were various other lights near the crossing that would tend to confuse the sight. *Held*, that the question of contributory negligence was properly left to the jury. *Beckwith v. New York C. & H. R. R. Co.*, 7 N. Y. Supp. 719 28 S. R. 130, 54 Hun 446; *affirmed in* 125 N. Y. 759.

Baltimore & O. R. Co. v. Anderson

BALTIMORE & O. R. Co.

v.

ANDERSON.

(Circuit Court of Appeals, Sixth Circuit, Feb. 8, 1898.)

Accident at Railroad Crossing in Street—Right of Public to Use Track as Footpath.*—Foot passengers are entitled to use railroad tracks as a crossing of an intersecting street.

Same—Due Care by Both Parties.*—And the negligence of a foot passenger in making such use of railroad tracks while a train is approaching from a short distance will not excuse the company if he was seen, or would have been seen had there been a lookout on the engine, in time to avoid injuring him.

Same—Defect in Track—Negligence and Contributory Negligence—Proximate Cause—Question for Jury.—In an action against a railroad company for injuries inflicted by its train on a foot-passenger so using its tracks, while the crossing gates were down, it appeared from the evidence that plaintiff's foot was caught in a hole in the planking between defendant's tracks, and he was thereby prevented from crossing in time to avoid an approaching train. *Held*, that the question whether the defect in the planking or plaintiff's contributory negligence was the proximate cause of the injury was properly left to the jury.

ERROR by defendant to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio. *Affirmed*.

This is a writ of error from the judgment of the circuit court for the Northern district of Ohio. The action was for damages for personal injury. The plaintiff was a newsboy in the town of North Baltimore, Ohio. The accident occurred in May, 1892, about four o'clock in the afternoon. The plaintiff, then a boy of about 12 years of age, had obtained his newspapers at the post office, on the north side of the intersection of the main street of North Baltimore and the defendant's railway tracks. At this point the railway tracks run east and west, and the main

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*See note at end of case.

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street runs north and south. The station of the railway company lies east of the intersection. The course of the plaintiff was from the post office, on the east side of the main street, south across the tracks. About the time that he left the post office, an engine, with a heavy freight train, was pulling out of the switch in front of the railway station, and was about to cross the main street. The gates were down. The plaintiff, with his newspapers, ran down on the east side of the street until he came within a few feet of the track, when he attempted to cross the street by the wood platform, which formed the intersection between the railroad tracks and the street. He seems to have proceeded diagonally across the platform. There was a conflict in the evidence as to how near to the street the locomotive of the freight train had come at the time the boy attempted to cross the track. When he reached the south rail of the track, about the middle of the street, his foot was caught in the opening between the platform and the rail. The evidence for the plaintiff tended to show that this opening was larger than it should have been; that the wood of the platform opposite the rail had been split off, making a hole a foot long, and between three and four inches in width, at the end of which there was a spike so situate that it caught the plaintiff's foot, and held it fast. The plaintiff introduced evidence to show that his crossing was so far in advance of the train that, had either the engineer or the fireman been looking out, the train might have been stopped after the boy was caught, in time to save him. The evidence of the defendant tended to show that the boy did not start across the track until the pilot or cow catcher of the engine had reached the sidewalk of the street, and that what he attempted to do really was to run around the front of the engine. The contention for the defendant was that the road was muddy, and that the boy was merely using the railway track as a means of crossing the muddy street, and that the public had no right to use the track for this purpose, and were obliged to confine their use of it to crossing the track at right

angles. Against the objection of defendant, evidence was introduced by plaintiff to show that it was customary for people to cross the street at that point upon the railway track from sidewalk to sidewalk. The plaintiff testified that he had no knowledge of the defect in the platform. It appeared that the platform was in the care of the railway company.

The defendant excepted to two passages of the charge of the court. The first passage was as follows: "Now, I am disposed to deal with the last proposition or the last question, first, and that is whether or not the defendant is liable, because, when the plaintiff attempted to cross that place, he either fell or lost his motion, so that he had no longer control of himself; whether or not in that condition of things the defendant did see, by its servants and agents in control of the engine, or, by the exercise of that caution which the law requires that it should exercise, could have seen, his condition in time to have averted the accident. Now, the law requires, as a common law duty, that when an engine is approaching a crossing known to be used by the public, that there should be some one on the engine, on the lookout, watching ahead, in a position to see whether any one is on the track liable to be hurt, and, if so, to use every appliance and every means known to the art of moving the locomotive engine to stop the engine and prevent an accident, if it can be reasonably done. That duty arises only when it becomes apparent to one on the lookout; and what would be the same thing is, if one on the lookout, and using reasonable care, could have seen the thing, it is the same as if it had been seen. Whereas, of course, as I said to you before, if the defendant, by having some person on the lookout, observing, could have seen that he had lost control of himself on the track, in sufficient time to have, by using all the means known to the management of locomotive engines, prevented the accident, it was its duty to do it, and, if it failed to do it, it would be liable." The second passage was as follows: "Now, that is a question for you to decide. What

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caught the boy? Are you satisfied of that by a preponderance of the testimony? Notwithstanding he might have undertaken to cross so close to that engine as that the ordinary accident would not make the company liable, such as having just struck him and run over him because I have said to you in that event the defendant would not be liable; but with his foot getting fast, and his inability to release himself, did that cause him to be run over, instead of his effort to cross the track too close to the train? If so, and you find that it was a dangerous defect about which the company was negligent, as explained to you, then your verdict should be for the plaintiff." The defendant further requested the court to deliver certain charges, which the court refused to deliver. They were as follows: "(1) If the plaintiff, instead of crossing the railroad track, was crossing the street, running or walking between the rails and on the planking, for the purpose of avoiding the mud, his purpose being to cross the street on such planking from east to west, and, while so doing, caught his foot in a hole in the planking, and fell and received the injuries, he cannot recover in this case. (2) The defendant was not bound to anticipate that the plaintiff would attempt to run longitudinally on its track in front of an approaching engine, as the plaintiff testifies he did, for the purpose of crossing from one side of the street to the other; and even though there was a piece split or splintered off of the side of the plank, as claimed by the plaintiff, by which his foot was caught, causing him to fall, and while his foot was so fastened he was run over by defendant's engine, there can be no recovery in this case. (3) There is no evidence in this case worthy the consideration of the jury proving or tending to prove that the fact that there was a piece split or worn off of the side of one of the boards in this crossing was the cause of the injury to the plaintiff, and the jury is therefore instructed to find for the defendant. (4) Under the facts and circumstances of this case, the defendant owed the plaintiff no duty except that of avoiding injuring him willfully; and there is no

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evidence in this case, worthy the consideration of the jury, tending to prove, or proving, that the injury to the plaintiff was willful on the part of the agents and servants of the defendant; and, if there were such evidence, there can be no recovery in this case upon that ground, for the reason that the charge against the defendant is that of negligence merely."

J. H. Collins, for plaintiff in error.

W. W. Skiles, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The main street of North Baltimore did not cease to be a public highway because the railroad company had laid its tracks across it at that point. The public are entitled to use a highway and cross from one side to the other as they are entitled to use it for longitudinal passage. If the platform constructed by the railway company at the intersection of its tracks with the street was a convenient mode of crossing from one side of the street to the other, we do not see that the railway company has any right to object to such a use. Its only right is to have the travelers upon the public highway observe due caution not to be in the way of its trains when the trains are crossing the highway. We think, therefore, that, if the plaintiff was otherwise exercising due care, his use of the railroad track to cross the street from one side to the other could not make his conduct negligent. A different rule might prevail where the railroad track is constructed along the highway longitudinally, and lies parallel to the course of travel in the street. In such a case, it might very well be held that it was negligence for the traveler along the highway to use the bed of the railroad track, when he might as well and as conveniently use the traveled part of the highway. But we apprehend that no such rule applies where the

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crossing is at right angles, and the traveler is merely attempting to cross over from one sidewalk to the other. The evidence shows that the street was frequently muddy, and, as the track made a dry crossing, the public used it. We cannot see that this was trespassing on the rights of the company in any way, or that the danger to the public in using such crossing was appreciably increased over what it would be in crossing the track at right angles. We do not think, therefore, that the introduction of evidence as to the custom of the public was prejudicial to the defendant. Our conclusion upon this point disposes of the exception based on the refusal of the court to give the first and second requests, in which it was assumed, as the law, that the public had no right to use the railway crossing as a means of crossing the street from one sidewalk to the other.

The passage of the charge first excepted to states the law correctly. In that charge the court assumed that the plaintiff was guilty of negligence in crossing the railway track as he did, and then stated to the jury that his negligence would not relieve the defendant from liability if they found that, by due care, the engineer and fireman might have stopped the train after they had seen, or ought to have seen, the position of danger in which the plaintiff, by reason of his negligence, was placed, and could thus have avoided injuring him. The objection on behalf of the defendant to this statement of the law is that there was no obligation on the part of the agents of the railway company to look out for the plaintiff, or to assume that he would put himself in the dangerous place. The plaintiff was one of the public. The obligations upon the public and the railroad company at an intersection of the track with a highway are correlative. *Improvement Co. v. Stead*, 95 U. S. 161. Neither is relieved from the duty of carefully watching the crossing to avoid accidents by the assumption that the other is doing his or its whole duty at such a place. *Blount v. Railroad Co.*, 22 U. S. App. 129, 9 C. C. A. 526,

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and 61 Fed. 375; Railroad Co. *v.* Houston, 95 U. S. 697; Schofield *v.* Railroad Co., 114 U. S. 615, 5 Sup. Ct. 1125. The same obligation on the part of the company does not arise to keep a lookout in cases where the person injured is a trespasser or is not using the highway as a highway. Railroad Co. *v.* Cook, 31 U. S. App. 277, 13 C. C. A. 364, and 66 Fed. 115; Railroad Co. *v.* Howe, 6 U. S. App. 172, 3 C. C. A. 121, and 52 Fed. 362. But the broad distinction between the case at bar and such cases is that the plaintiff here was on the highway, where he had the right to be unless there was danger of his being run over by a train of defendant, and where the defendant was bound to anticipate the possibility of his being when it was using the crossing. This distinction is clearly brought out by Judge Lurton in delivering the opinion of this court in Railroad Co. *v.* Cook, 31 U. S. App. 288, 13 C. C. A. 367, and 66 Fed. 119. Our conclusion that the first passage of the charge excepted to was correct disposes also of the exception based on the refusal of the court to give the fourth of defendant's requests to charge, which embodies the theory that, if the plaintiff was negligently on the crossing, the railway company was under no obligation to keep a lookout for him.

We come now to the second passage of the charge, which was excepted to. By this passage the court left to the jury the questions—First, whether the defendant was negligent in allowing such a defect in the platform; and, second, whether the proximate cause of the accident was the negligence of the plaintiff in crossing in front of the approaching train or his being caught in the dangerous hole, of the existence of which he was ignorant, and directed a verdict for plaintiff only in case defendant's negligence was the cause of the defect in the platform, and the defect was the proximate cause of the accident. The action of the trial court was in accord with the decision of this court in Railway Co. *v.* Craig, 37 U. S. App. 654, 19 C. C. A. 631, and 73 Fed. 642. In that case the plaintiff was a switchman, who

Same—Defect in Track—Negligence and Contributory Negligence—Proximate Cause—Question for Jury.

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had been injured while attempting to uncouple two cars by having his foot caught in an unblocked frog, and the liability sought to be imposed on the company was based on its failure to comply with the statute requiring it to block all frogs. The proper construction of the statute made contributory negligence of the injured person a defence to his recovery for its violation. The trial court charged the jury that, if he did not know that the frog was unblocked, his negligence in going between the cars when moving at a too rapid rate of speed could not contribute to the accident, because it could not be the proximate cause thereof, but the defective frog must be such proximate cause, and that alone. The case was reversed on the ground that under such circumstances the question of proximate cause should have been left to the jury. This is the course which the judge at the circuit took in the case at bar. He left to the jury to decide whether it was the negligence on the part of the plaintiff in crossing before the engine which proximately caused the accident, or in the fact that his foot was caught in the hole.

No other errors appear in the record, and the judgment of the court below is affirmed.

NOTES.

Right of Public to Use Railroad Track in Highway.—Railroad companies, in running cars on streets or other thoroughfares, are held to a very high degree of care and diligence. The use of that part of the street where the track is laid is not exclusive. The entire public has a right to use such streets. *Toledo, W. & W. R. Co. v. Harmon*, 47 Ill. 298.

Where a track is laid in a public street, the rights of the public and the company respecting the use thereof are mutual, though those of the latter are paramount. A person is not a trespasser who walks along such track, and if in so doing his foot becomes fastened in an opening which exists by reason of negligent construction of the track, and he is run upon by a train of the company which is negligently managed, he being without fault, the company is liable. *Louisville, N. A. & C. R. Co. v. Philips*, 31 Am. and Eng. R. Cas. 432, 112 Ind. 59, 13 N. E. Rep. 132.

The right of a company to use that part of a street where its track is laid is not exclusive; all other cars, carriages, and persons who are authorized by law to use the same place have the same

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rights as the company, but the same degree of care and caution must be exercised by each. *Mooney v. Hudson River R. Co.*, 1 Sweeny (N. Y.) 325.

When a track is laid by authority of law in a public thoroughfare, the right of a company owning the track to operate trains thereon is superior to the right of the general public to walk along said track, but having a superior right thereon does not relieve the company from liability to damage for injury to persons caused solely by its negligence in using said track. *Louisville & N. R. Co. v. Yniestra*, 29 Am. & Eng. R. Cas. 297, 21 Fla. 700.

An individual walking on a track in a city street is not a trespasser, and the company must run its trains with reference to him and to all others who may be rightfully upon the street. *Kansas Pac. R. Co. v. Pointer*, 9 Kan. 620.

The right of the public in a highway crossing a railroad is simply a right of passage across the railroad, and no individual has the right to commit a trespass upon the company's property within the limits of the highway crossing, which is for the purpose of passage from one side of the railroad to the other; and any other use thereof, whether between the tracks or rails, is unwarranted. The right of way and of use, when not used or required for such passage, belongs to the railroad company, and may be used by it in the same manner as if no street crossing was there. *Kelly v. Michigan C. R. Co.*, 28 Am. & Eng. R. Cas. 633, 65 Mich. 186, 31 N. W. Rep. 904.

Same—Mutuality of Rights and Duties.—At places other than crossings, a railroad track is the private property of the company; and strangers who go upon or cross the track at such places are naked trespassers, to whom the railway company owes no duty. But a traveller on a highway at a railway crossing is not a trespasser, and toward him at such a crossing the railway company must use that reasonable degree of care due toward a person having equal rights with itself. In such cases, the rights and obligations of the Railway company and the traveller are mutual and reciprocal. *Continental, etc., Co. v. Stead*, 95 U. S. 161; *Indianapolis, etc., R. Co. v. McLin*, 82 Ind. 435; *Toledo, etc., R. Co. v. Goddard*, 25 Ind. 185; *Penna. R. Co. v. Krick*, 47 Ind. 368; *Beisiegel v. N. Y. Cent. R. Co.*, 40 N. Y. 9; *Black v. Burlington, etc., R. Co.*, 38 Ia. 515; *Rockford, etc., R. Co. v. Hillmer*, 72 Ill. 235; *Penna. R. Co. v. Goodman*, 62 Pa. St. 329; *Baltimore, etc., R. Co. v. Owings* (Md. 1886), 28 Am. & Eng. R. R. Cas. 639; *Louisville, etc., R. Co. v. Goetz*, 79 Ky. 442; s. c., 14 Am. & Eng. R. R. Cas. 627.

Company Liable for Injury at Crossing Occasioned by Negligence After Becoming Aware of the Party's Peril, Notwithstanding His Contributory Negligence.—Notwithstanding the fact that a person has been guilty of contributory negligence in attempting to cross a railroad track without stopping, looking and listening, the company is liable for injuring him if the servants on the train after they see his danger could have avoided the accident but have failed to do so. *State v. Manchester, etc., R. R. Co.*, 52 N. H. 528; *Texas and Pacific R. Co. v. Chapman*, 57 Tex. 75.

As to the measure of care required on the part of the engineer in such cases, see *Bell v. Hannibal & St. Jo R. R. Co.*, 72 Mo. 50; s. c., 4 Am. & Eng. R. R. Cas. 580.

And see the following cases upon the same principle: *Northern Central R. Co. v. Price*, 29 Md. 420; *Kenyon v. New York, etc., R.*

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Co., 5 Hun (N. Y.), 580; Meyers *v.* Chicago, etc., R. Co., 59 Mo. 223; Locke *v.* First Div. St. Paul & Pac. R. Co., 15 Minn. 350; Baltimore, etc., R. Co. *v.* Trainor, 33 Md. 542; Paducah, etc., R. Co. *v.* Hoche, 12 Bush. 41; Cleveland, etc., R. Co. *v.* Elliott, 4 Ohio St. 475; Isbell *v.* New York & N. H. R. Co., 27 Conn. 393; Trow *v.* Vermont, etc., R. Co., 24 Vt. 494; Richmond *v.* Sacramento Valley R. Co., 18 Cal. 351; Colorado Central R. Co. *v.* Holmes, 8 Am. & Eng. R. R. Cas. 410; Zimmerman *v.* Hannibal & St. Jo R. R. Co., 2 Am. & Eng. R. R. Cas. 191; Price *v.* St. Louis, K. C. & N. R. Co., 3 Am. & Eng. R. R. Cas. 365; St Louis, Iron Mt. & S. R. Co. *v.* Freeman, 4 Am. & Eng. R. R. Cas. 608; Behrens *v.* Chicago, R. I. & P. R. Co., 6 Am. & Eng. R. R. Cas. 222; Rains *v.* St. Louis, etc., R. Co., 5 Am. & Eng. R. R. Cas. 610; Little Rock, etc., R. Co. *v.* Parkhurst, 5 Am. & Eng. R. R. Cas. 635; Chicago, etc., R. Co. *v.* Johnson, 8 Am. & Eng. R. R. Cas. 225; Swigert *v.* Hannibal & St. Jo R. R. Co., 9 Am. & Eng. R. R. Cas. 322; Yarnall *v.* St. Louis, K. C. & N. R. Co., 10 Am. & Eng. R. R. Cas. 726; Terre Haute & Ind. R. R. Co. *v.* Graham, 12 Am. & Eng. R. R. Cas. 77; Schwier *v.* New York, etc., R. Co., 14 Am. & Eng. R. R. Cas. 656.

LOUISVILLE & N. R. Co.

v.

SMITH.

(Court of Appeals of Kentucky, Jan. 26, 1898.)

Injury at Street Crossing—Duty of Company to Repair Track.*— Plaintiff's amended petition alleged, in substance, that while driving across defendant's track in a public street one of his horse's feet was caught in a dangerous hole in the road bed, and that plaintiff was in consequence thrown violently from his vehicle, and seriously injured; that defendant was chargable with notice of the existence of such hole, and had negligently suffered it to remain unrepaired for more than a month. *Held*, that such petition set forth a cause of action; and its allegations having been sustained by the evidence, verdict for plaintiff must be affirmed.

Appeal by defendant from Oldham county circuit court. *Affirmed.*

D. H. French, for appellant.

Peak & De Haven and *A. T. Ladd*, for appellee.

GUFFY, J. It is substantially alleged in the petition that the line of appellant's railway runs through the

*See note at end of case.

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town of Lagrange over and through Main cross street in said town, which Main cross street is a public highway, and extensively used by the public in traveling on foot and horseback and in vehicles; and that in said railway across said street there was suffered and permitted to be and remain a hole between the metallic rail of said track and the heavy timber parallel with and near said rail, which hole and opening was in the midst of the most frequently traveled part of said street crossing, and said hole and opening was dangerous in its character, but the defendant negligently, carelessly, and willfully failed to repair said hole and opening; that on the—day of June, 1895, while driving along and over said street in a one-horse spring wagon, and while attempting to cross appellant's said railway at said public street crossing his horse caught its foot in said hole and opening, thereby causing his said horse to fall to the ground, and violently throw plaintiff from his said wagon to the ground, thereby seriously and permanently injuring this plaintiff externally and internally, and causing various severe bruises and sprains which were then and there inflicted on his body, whereby he has suffered great pain and agony mentally and physically; that he has been put to great expense in employing physicians, and will be during the remainder of life crippled. Plaintiff says that said injuries, suffering, and permanent disability were caused by the wanton, gross, and willful neglect of defendant, and defendant's wanton, gross, and willful neglect in failing and refusing to repair said hole was the immediate cause of plaintiff's horse catching its foot in said hole, and thereby falling to the ground, and violently throwing this plaintiff to the ground; and on account of said suffering and permanent disability he has thereby been damaged in the sum of \$10,000, for which he prays judgment. Afterwards plaintiff filed an amended petition, and, after reiterating the averments in the original petition, it is substantially alleged that the said hole or opening between the metallic rail of said rail-

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way track and the heavy timber placed near thereto was negligently suffered and permitted to so remain by defendant for a long period of time, to wit, one month or more before the injuries and accident complained of in the petition occurred; that the defendant knew, or by the use of ordinary diligence could have known, of said hole or opening, and of the dangerous condition of same, and it suffered and permitted said hole and opening to remain at said place in its said dangerous condition for said period of time. Appellant entered a motion to require plaintiff to elect which cause of action set up in his petition and amended petition he would prosecute, which motion was overruled by the court. The defendant entered a demurrer to the petition and amended petition, and the court, being advised, overruled said demurrer. The answer may be treated as a denial of the averments of the petition showing the existence of the hole in said crossing, and also the allegations of injuries sustained by plaintiff. It is also denied that the alleged injuries, suffering, or disability were caused by any negligence of defendant. It is also denied that appellant knew, or could by any ordinary care or diligence have known, of the existence of said hole, and the existence of the hole is denied. In the third paragraph of the answer it is alleged that the crossing where plaintiff claimed to have been injured was in good and safe condition for horses to pass over without danger, and no defects therein known to this defendant or any of its agents or servants, or could have been discovered by the use of ordinary diligence; that at the time plaintiff claims to have been injured he was driving his horse over and across said crossing at a very fast and rapid, unusual, unsafe, and imprudent rate of speed, and by so doing his horse's foot slipped on the iron rail, and it stopped suddenly, and fell to the ground, and plaintiff sprang or jumped off his wagon at the time, and, as defendant is informed, and charges to be true, was not then or there in any way injured or crippled; that whatever injury plaintiff sustained, if any, was sustained in consequence of his

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own negligence and carelessness, and not in consequence of any carelessness or negligence of this defendant, or its agents or servants, or either. Plaintiff's reply is a traverse of all the affirmative averments contained in the answer. A trial resulted in a verdict and judgment in favor of appellee for \$1,000, and, appellant's motion for a new trial having been overruled, it prosecutes this appeal.

The grounds for a new trial are, in substance: (1) That the damages are excessive, appearing to have been given under the influence of passion or prejudice. (2) The verdict is not sustained by sufficient evidence, and is contrary to the law and evidence. (3) The court erred in giving the instructions given. (4) The court erred in refusing instructions offered by defendant. (5) Error in admitting incompetent evidence, and excluding competent evidence offered by appellant. We are not inclined to the opinion that there were two distinct causes of action set up in the petition, hence the motion to require plaintiff to elect was properly overruled. It further seems to us that the petition and amended petition, taken together, constituted a cause of action; hence the demurrer was properly overruled. But, even if it was necessary for plaintiff to have alleged that he was using ordinary care in driving his horse attached to the vehicle in which he was riding, yet it seems to us that the pleadings, evidence, and instructions finally and fully presented that issue for trial. The evidence is voluminous, and to some extent conflicting; but it seems to us that the jury were fully authorized, under the testimony, to find for plaintiff. Nor can we say that the verdict, under the proof, is excessive, or that there is any evidence that it was given under the influence of passion or prejudice. We fail to perceive any error upon the part of the court to the prejudice of appellant's substantial rights either in admitting or rejecting testimony. We have carefully considered the instructions given, and perceive no error to the prejudice of appellant's substantial rights; and, inasmuch as the instructions given presented correctly the whole law

Note

of the case, it was not error to refuse the instructions offered by appellant. Judgment affirmed, with damages.

NOTE.

Injuries at Street Crossings—Duty of Company to Repair Track.— See 16 Am. & Eng. R. Cas. a. 57, 13 Am. & Eng. R. Cas. a. 610, and 14 Am. & Eng. R. Cas. a. 57.

It is the duty of a railroad corporation, both under the statute (ch. 140, Laws of 1850) and upon common law principles, to keep its road at a crossing in safe condition, so that a traveler upon the highway exercising ordinary care can pass over the same in safety. *Gale v. New York C. & H. R. R. Co.*, 76 N. Y. 594.

For a negligent breach of this duty it must answer in damages to one who exercises ordinary care and sustains an injury from the breach of duty by the company. But the presumption of negligence which prevails in cases where passengers are injured while on the trains of the carrier does not obtain where injury is received at a crossing. *Terre Haute & I. R. Co. v. Clem*, 42 Am. & Eng. R. Cas. 229, 123 Ind. 15, 23 N. E. Rep. 965, 7 L. R. A. 588.

If a railroad knowingly permits a crossing to be out of repair, whereby one on the highway is injured, it is liable for the damages. *Pittsburg, Ft. W. & C. R. Co. v. Dunn*, 56 Pa. St. 280.

A railroad is not liable for an injury resulting from its crossing being out of repair, unless it had notice of such fact or the defect existed a sufficient length of time to justify the presumption of notice. *Mann v. Chicago, R. I. & P. R. Co.*, 86 Mo. 347.

It is the duty of a railroad company whose tracks cross a public highway to keep such crossing in a reasonably safe condition for the passage of wheeled vehicles, and where it carelessly and negligently permits the crossings to become unsafe and dangerous for travel it is liable for injury to a person using the crossing while in the exercise of ordinary care. *Tetherow v. St. Joseph & D. M. R. Co.*, 98 Mo. 74, 11 S. W. Rep. 310.

Though the defect in a roadbed was not caused by any act of the company, yet if they knew of its existence, and that the street was made dangerous thereby, it was their duty to have it repaired; and neglecting to repair they were liable for the consequences of their negligence. *Oakland R. Co. v. Fielding*, 48 Pa. St. 320.

A railroad company crossing a public highway is liable for an injury occasioned to a traveler by a want of repair in the approaches to the crossing. And it makes no difference that the traveler knew of the want of repair; he had a right, notwithstanding, to use the highway. *Maltby v. Chicago & W. M. R. Co.*, 13 Am. & Eng. R. Cas. 606, 52 Mich. 108, 17 N. W. Rep. 717.

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STATE, TO USE OF PRICE *et al.*

v.

CUMBERLAND & P. R. Co.

(*Court of Appeals of Maryland, Feb. 10, 1898.*)

Accident at Crossing—Failure to Give Signals—Contributory Negligence—Proximate Cause.*—A railroad company is not liable for the death of a person killed while attempting to drive across its tracks at a public crossing in front of an approaching train which deceased should have seen before making such attempt, though those in charge of such train failed to give the crossing signals.

APPEAL by plaintiff from Alleghany county circuit court. *Affirmed.*

Argued before MCSHERRY, C. J., and BRYAN, BRISCOE, PAGE, PEARCE, and BOYD, JJ.

Clayton Purnell and *Ben A. Richmond*, for appellant.

Robert H. Gordon and *Ferd. Williams*, for appellee.

BOYD, J. This is an action brought in the name of the state of Maryland, for the use of the widow and daughters of Dr. Thomas C. Price, against the Cumberland & Pennsylvania Railroad Company, founded on the alleged negligence of the company's agents, resulting in the death of the doctor. At the conclusion of the testimony offered by the plaintiff, the court below instructed the jury that there was no evidence legally sufficient to entitle the plaintiff to recover, and directed a verdict to be rendered for the defendant. That action of the court presents the only question for our review. There were only two witnesses to the accident examined, and their testimony is very unsatisfactory in reference to most of the material facts involved in the

*See note at end of case.

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case. The accident happened at a point where a county road crosses the railroad on what is called a "Y" track. The railroad, in order to get to Frostburg by a practicable grade, runs westerly to a point near Borden Mines, and then easterly for some distance, and then westerly again towards Frostburg, thus gradually ascending the hill. The train with which we are concerned was composed of an engine and coal cars, and, after stopping at a coal tipple which is near the westerly terminus of the main track, was backing up the Y track, when the collision with Dr. Price's buggy took place on the crossing above spoken of. He had been to Alleghany, a neighboring village, to see a patient, and was on his way to Frostburg, where he resided, when his buggy was struck by the train, and he died almost immediately after the accident. The witnesses who testified seem to have had no definite idea of the distance between the points spoken of in their testimony, or even the length of the train. There was a plat used at the argument, which, although not shown in the record to have proven to be correct, we understand to have been conceded to be so in this court. Assuming it to have been correctly made according to the scale marked on it, the distance from the coal tipple to the point where the Y track leaves the main track is about 400 feet, and from the latter point to the county road about 600 feet. The witnesses who saw the accident were Mrs. Frank Devore and Joseph Malooley. It is impossible to tell from the record with any precision where the former was, as the points she speaks of are not located on the plat, but she said she was on what we have called the "main track," by which we mean the part of the track before entering the Y, and that is from three to four hundred feet from the county road at the nearest points, as laid down on the plat. Malooley was on the car that struck Dr. Price's buggy, being the rear car of the train, or, as it was being pushed backward up the grade, the first car to reach the crossing. Mrs. Devore thought the accident happened about 6 o'clock in the evening, October 26, 1896, but

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she said she could see the train and Dr. Price plainly. She described with some detail what occurred at the crossing, even to the number of times the doctor struck his horse. So, whatever the hour was, it was still sufficiently light for any one to see the train moving. As Dr. Price reached the railroad, his horse balked, and remained on the track long enough to let the buggy in which he was riding be caught by the train, although the horse escaped.

Suits for damages resulting from collisions with railroad trains by persons crossing the tracks have been so numerous in this state that there is no longer much difficulty about the general principles of law applicable to them, and it is usually only necessary to examine carefully and critically the facts in any particular case to ascertain the extent of the liability of the defendant. Our statute which authorizes suits to be brought for the death of a person caused by the wrongful act, neglect, or default of another limits the right of recovery to such act, neglect, or default as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, and hence the test in this case is whether Dr. Price could have recovered if he had survived the injuries sustained by him. To do so, it would have been incumbent on him to prove that the action was caused entirely by the negligence or default of the defendant's agents or agent, and it must not have appeared from the evidence that his want of ordinary care and prudence directly contributed to cause the accident. Burns' Case, 54 Md. 113. To put the company on defence, it was not sufficient to prove negligence of its agents, but also that such negligence caused the injury. If, in attempting to prove those essentials, the evidence disclosed the fact that the accident really happened as a result of the doctor's own negligence, then the plaintiff is precluded from recovery, because the defendant cannot be made responsible for results caused by the fault of the one whose injuries are the basis of the suit. So long as there is any reasonable doubt on that question, the jury must resolve

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it; but when the fact is so clearly established by the evidence as to leave no room for rational minds to differ, without entering into the realms of speculation and conjecture, then it is the duty of the court to determine it. The legal sufficiency of the whole evidence to sustain a verdict is as clearly for the court as is the weight or credibility of the testimony for the jury when the facts are in dispute. Of course, when the court is called upon to pass upon the legal sufficiency of the evidence, it must assume it to be true. These general propositions have been so frequently announced by this court that we deem it unnecessary to cite authorities to sustain them, and we only refer to them because it is proper that they should be borne in mind as the facts in the record are considered and the law applied.

The negligence relied on by the plaintiff consists of the alleged failure of the defendant's agents to give any signal of the approach of the train. Mrs. Devore swore she did not hear the whistle blow or the bell ring, although she was close enough to have heard them. It is true that she did not notice that there was another train on the main track, the engine of which did whistle, according to the witness Malooley; but it must be admitted that there was some evidence that the engine of the train that caused the accident did not whistle and the bell was not rung. It is also claimed by the plaintiff that there was neither light nor trainman on the first car, as it approached the crossing, to give warning of its approach. It is apparent, however, that a light would have been of no service, as it was not dark enough to require it. Mrs. Devore said: "It was light enough; I could see everything plain;" and we have already seen the distance she was from the crossing when the accident happened. Nor is there any positive proof that there was not a trainman on the car. Mrs. Devore's evidence as to that was as follows: "Q. Mrs. Devore, did you see anybody on the end of the train? A. I did not see anybody on the end of the train. Q. I mean the rear end of the train. A. I never took no notice. Q. You never took no notice? A. No, sir; I was

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too excited." Malooley was asked: "Were there any brakemen on the end of the train? A. I do not know whether there was or not. Q. Was anybody on the end of the train? A. They might have been on there, and I not seen them." So the only evidence tending to show negligence was the failure to ring the bell or blow the whistle, if those omissions be conceded to be negligence. But there is no evidence from which it could be properly inferred that the omission to do either of those acts in any way misled Dr. Price or caused the accident. The only possible object in giving such signals is to warn persons using the county road of the approach of trains. It was the duty of Dr. Price to look and listen as he approached the crossing to ascertain whether a train was coming, and the failure on the part of the agent of defendant to blow the whistle or ring the bell did not excuse him from the exercise of that reasonable precaution. *Neubeur's Case*, 62 Md. 391. We see nothing in the record that would have justified the jury in finding that there was any difficulty in his seeing the train as he approached the railroad. It is true that the evidence showed that there was a rail fence along the side of the county road, and some locust and maple trees growing on the fence line; but it is not shown that they would prevent any one driving in a buggy, as Dr. Price was, from seeing the railroad. Indeed, it does not appear whether the foliage was still on the trees on the 26th of October, when the accident happened. Then, too, the evidence of Mrs. Devore shows she had no difficulty in seeing the doctor as he drove along the road, and he could certainly have seen a train, even if he could not have heard it as it was pushed up that grade. But, if his view of the railroad was obstructed so as to prevent him from seeing whether a train was approaching, it was his duty to stop, look, and listen before attempting to cross. And if a party neglect these necessary precautions, and receive injury by collision with a passing train, which might have been seen if he had looked, or heard if he had listened, he will be presumed to have contributed, by his own negligence,

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to the occurrence of the accident; and, unless such presumption be repelled, he will not be entitled to recover for any injury he may have sustained. *Hogeland's Case*, 66 Md. 149, 7 Atl. 105.

But it was argued with great ingenuity and ability by the counsel for the appellant that the accident was caused by reason of the fact that the train was standing still when Dr. Price started to cross the track, but started suddenly, and without warning, overtaking him before he could escape from the track, thereby causing the accident, and that there was, at least, sufficient doubt about that to require its submission to the jury. The evidence, however, does not sustain that contention, and it would have been impossible for the jury, in the face of the testimony in the record, to have reached that conclusion by any method short of mere conjecture. It is true that the train had been standing still, but just when it started, and exactly where he was when it did start, are not shown, but that he was not on the crossing at the time the train started is conclusively shown by the two witnesses who saw the accident. Mrs. Devore, in answer to the question how far the rear end of the train (meaning the end nearest the crossing) was from the crossing when the train was standing still, said she could not tell exactly, but finally said, on being asked whether it was the length of the court room of the circuit court of Allegany county, where the case was being tried, that it was not that far away. Then followed this portion of her testimony: "Q. Then you saw it standing there? A. Yes sir. Q. And you saw the horse on the crossing? A. No sir. Q. Coming up to the crossing? A. He was not on the crossing. He was a good way from the crossing when the train was standing still, but as he came towards the crossing, the train started to come up." The witness Malooley had a good opportunity to see how the accident happened, as he was on the car that struck the buggy on the side of it next to Dr. Price, as he approached the track. He was not in the employ of the railroad company, but was riding home

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from the mines where he worked. He gave this account of the accident: "Q. You were on the side of the car coming up the hill. Which way were you looking? A. I was looking right towards where the doctor was driving up towards the train. Q. Now, how far was your car from the crossing when it was standing still? A. I could not say. Q. You cannot say. Now when the train started, where were the doctor and the horse? A. Why the doctor was driving. When I took notice to him, the doctor was driving right up. Q. Now tell the jury you saw the doctor drive up. Tell the jury. A. I saw the doctor drive up towards the hill. His horse stopped and balked on the crossing. Q. His horse balked on the crossing? A. Yes sir. Q. Then what happened? A. He tried to get the horse across the crossing, and he refused to go. He tried to pull him back and he refused to come back. He clapped his lines, and I heard him hollow, 'Get up' twice, and when the train drewed close the horse jumped out, and it caught the buggy. Q. You saw the doctor coming up to the track? A. Yes sir; saw the horse on the track. Q. And the doctor would have gotten across if the horse had not stopped? A. If he had not balked. Q. And he got on the track—the horse and buggy,—and the doctor slapped the lines, and told him to get up? A. Yes sir; and as the train came up it hit the buggy." On cross examination he said he could see Dr. Price coming towards the crossing, and he thought he could see him the length of the court room from the crossing, and then testified as follows: "Q. Well then, Dr. Price could have seen the train that far away? A. I saw Dr. Price see the train. Q. You saw Dr. Price see the train? A. Yes sir. How do you judge that? A. He was looking at it. He was looking towards me anyway. Q. How far was the train from the doctor when the doctor tried to make the crossing? Do you know? A. I could not say how far he was at all." The evidence, therefore, shows conclusively that the train was moving before Dr. Price reached the crossing, and that he saw it coming. Mrs.

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Devore said she saw him hit the horse three times, and the horse jumped back three times; that "the horse pulled towards Frostburg, and the horse balked in the middle of the track, and I saw him whip him again and he balked back, and he stayed there until the cars ran over him." The approach on the county road to the railroad is described as very steep, and the plat shows it is at such an angle that a horse moving up the hill might well be frightened by a train coming from the direction this one was. That was probably the cause of the horse's balking; but, however that may be we think it is apparent from the testimony that the train did not start to move after Dr. Price had driven on the railroad, but that he saw it coming, and endeavored to cross the track ahead of it. Had it not been for the unfortunate fact that this trusted animal failed its master on that momentous occasion, he would doubtless have gotten over safely, but that was a risk he assumed. We know of no law that would permit a recovery under such circumstances. Indeed, it was conceded in the argument that, if the train was moving when he attempted to cross, the plaintiff could not recover. As the evidence convinces us that such was the case, and that there was no conflict on the subject, and nothing from which the jury could properly infer the contrary, the judgment of the court below must be affirmed. Judgment affirmed, with costs.

NOTE.

Accident at Crossing—Failure to Give Signals—Contributory Negligence—Proximate Cause.—Although a railway company may omit the statutory duty of ringing a bell or sounding a whistle at a public road crossing, still a party claiming to recover for an injury in consequence of such omission of duty must have used due care and caution. The negligence of the company does not absolve him from all care. The plaintiff in such case, to recover, is required to exercise such care as might be expected of prudent men generally, under like circumstances. *Wabash, St. L. & P. R. Co. v. Wallace*, 19 Am. & Eng. R. Cas. 359, 110 Ill. 114; *Meeks v. Southern Pac. R. Co.*, 52 Cal. 602, 20 Am. Ry. Rep. 115; *Cincinnati, H. & I. R. Co. v. Butler*, 23 Am. & Eng. R. Cas. 262, 103 Ind. 31, 2 N. E. Rep. 138; *Shæfert v. Chicago, M. & St. P. R. Co.*, 62 Iowa 624, 17 N. W. Rep. 893;

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Sala v. Chicago, R. I. & P. R. Co., 85 Iowa 678, 52 N. W. Rep. 664; *Matta v. Chicago & W. M. R. Co.*, 32 Am. & Eng. R. Cas. 71, 69 Mich. 109, 13 West. Rep. 717, 37 N. W. Rep. 54; *Stepp v. Chicago, R. I. & P. R. Co.*, 85 Mo. 229; *Petty v. Hannibal & St. J. R. Co.*, 28 Am. & Eng. R. Cas. 618, 88 Mo. 306; *Steves v. Oswego & S. R. Co.*, 18 N. Y. 422; *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358; *Baxter v. Troy & B. R. Co.*, 41 N. Y. 502; *Dascomb v. Buffalo & S. L. R. Co.*, 27 Barb. (N. Y.) 221; *affirmed* in 24 How. Pr. 609. *Krauss v. Wallkill Valley R. Co.*, 23 N. Y. Supp. 432, 52 N. Y. S. R. 838, 69 Hun 482; *Cleveland, C., C. & I. R. Co. v. Elliott*, 28 Ohio St. 340, 14 Am. Ry. Rep. 123; *International & G. N. R. Co. v. Jordan*, (Tex.) 10 Am. & Eng. R. Cas. 301; *Beyel v. Newport News & M. V. R. Co.*, 45 Am. & Eng. R. Cas. 188, 34 W. Va. 538, 12 S. E. Rep. 532; *Williams v. Chicago, M. E. St. P. R. Co.*, 23 Am. & Eng. R. Cas. 274, 64 Wis. 1, 24 N. W. Rep. 422.

One crossing a railroad track must be on the alert to avoid injury from trains that may happen to be passing; and the omission of the engineer to give the precautionary signals of the approach of a train, when it in no way contributed to an alleged injury, does not impose a liability upon the company. *Parker v. Wilmington & W. Co.*, 8 Am. & Eng. R. Cas. 420, 86 N. Car. 221.

It is negligence *per se* for one to stand between tracks while trains are passing, defeating a recovery for an injury so received, even though no whistle was sounded or bell rung. *Moore v. Philadelphia, W. & B. R. Co.*, 108 Pa. St. 349.—Quoting *Carroll v. Pennsylvania R. Co.*, 12 W. N. C. 348.—*Followed* in *Marland v. Pittsburg & L. E. R. Co.*, 123 Pa. St. 487. *Quoted* in *Dlauhi v. St. Louis, I. M. & S. R. Co.*, 105 Mo. 645; *McGeehan v. Lehigh Valley R. Co.*, 149 Pa. St. 188.

The statute requiring signals at crossings superadds a duty upon the company, the disregard of which would impose no greater or other liability than would follow from a common law liability in respect to care in running a train, and the mere omission would not of itself render the company liable. *International & G. N. R. Co. v. Jordan*, (Tex.) 10 Am. & Eng. R. Cas. 301.—Quoting *Houston & T. C. R. Co. v. Nixon*, 52 Tex. 19.

Though the company was negligent in failing to give the signals, such negligence would justify no one in carelessly driving upon the track, if such act was negligence and contributed to the injuries sustained. *International & G. N. R. Co. v. Jordan*, (Tex.) 10 Am. & Eng. R. Cas. 301.

The jury were instructed that "if, by the neglect or omission of those in charge of the yard to give any warning of the approach of that car to the crossing, at the time when the engine was standing still or moving west, the plaintiff's vigilance was allayed, the defendants are not at liberty to impute the consequences of their acts to his want of vigilance, and if their acts brought him within the boundaries of peril the defendants must answer for the result." *Held*, error, since the jury might infer that if the defendant's employees were guilty of negligence which in any way tended to influence the plaintiff's action, negligence on the part of the plaintiff should not affect his right to recover. *Abbot v. Dwinnell*, 74 Wis. 514, 43 N. W. Rep. 496.

Stewart v. New York, N. H. & H. R. Co

STEWART

v.

NEW YORK, N. H. & H. R. Co.

(Supreme Judicial Court of Massachusetts, Feb. 28, 1898.)

Accident at Crossing—Temporary Bridge — Highways — Signboards.—While work was in progress for the purpose of separating the grades of a street and defendant's road, defendant, the street being closed up, built a bridge over its road-bed, and not within the limits of the street, for the use of the public. *Held*, that such bridge was not a highway over which a signboard was required to be maintained by the law of Massachusetts.

Same—Injury to Licensee on Track—Contributory Negligence.*—In an action to recover for the negligent killing of plaintiff's intestate, it appeared from the evidence that deceased, in broad daylight, without looking out for cars, apparently absorbed in meditation, stepped from such bridge upon defendant's track in front of an approaching train. *Held*, that on the common law counts of the declaration there was not sufficient evidence of due care on the part of plaintiff's intestate, and that a verdict was rightly ordered for defendant.

EXCEPTIONS by plaintiff from Plymouth county supreme judicial court. *Exceptions overruled.*

E. F. Leonard, for plaintiff.

Hosea Kingman, for defendant.

FIELD, C. J. The exceptions recite that the declaration contained three counts, the first under Pub. St. c. 112, § 213, and the second and third at common law.

Case Stated. We are of opinion that the exceptions show that this crossing, at the time of the accident, was not a crossing such as is described in Pub. St. c. 112, § 163. Work was in progress for the purpose of separating the grades of Grove street and the railroad according to the report of commissioners appointed by the superior court, which had been confirmed on May 5, 1894. By that report Grove street was to be carried

*See note at end of case.

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over the railroad, its grade was to be raised, and that of the railroad lowered. At the time of the accident Grove street had been closed up, and a foot bridge had been built by the defendant for the use of the public during the construction necessary to separate the grades. This bridge was not within the limits of Grove street. The defendant had built the bridge over that part of its roadbed which had been excavated with an incline down to its easterly track, and had planked a way across two of its tracks, which led to an opening in the fence on the old location of the railroad and through this out to the sidewalk on Grove street. This way was not a highway or townway or a traveled place over which a signboard was required to be maintained by Pub. St. c. 112, §§ 164, 165. The action, therefore, cannot be maintained on the first count. *Coakley v. Railroad*, 159 Mass. 32, 33 N. E. 930.

Accident at Crossing—Temporary Bridge—Highways—Signboards.

Although the exceptions recite that the second count is at common law, it seems to us to have been intended as a count under the same statutory provisions as the first. The third count undoubtedly is at common law. The accident occurred at about 1 o'clock in the afternoon. The only evidence of the manner in which the accident occurred is as follows: "The only witnesses who testified to seeing the accident were two boys 14 years of age, who had been down to the steam shovel, and, coming back, got upon the easterly end of said bridge, and proceeded westerly thereon until within less than ten feet of the easterly rail of said defendant's track on the incline, where they for the first time saw train on said track approaching from the north, but did not hear it; and one of the boys testified that he did not see the train until it was, at said bridge, and the other that he did not see it until it was within 25 feet of the bridge. They were about to cross the track when they stopped, and while they stood there heard the footsteps of said James Stewart back of them, and looked around, and saw him for the first time, and

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saw him proceed without stopping or looking to right or left, but looking down on the bridge, as if absorbed in deep thought, and saw him step from said incline in front of said train, and try to step back as he saw his danger; but he was too late, and was struck, and received the injuries from which he died the next day, though there was no evidence of conscious suffering. That they did not hear any whistle of said engine sounded prior to the accident, and did not hear any bell ring. There was a train moving under said bridge at the time of the accident, as one said, loaded, and in a northerly direction. The other said it was moving southerly, but that it was making considerable noise." We assume that, although there was no evidence of conscious suffering, yet, as the death was not instantaneous, the action can be maintained at common law, if the defendant's negligence caused the injury, and the plaintiff's intestate was in the exercise of due care. *Hollenbeck v. Railroad*, 9 Cush. 478. But we are of opinion that on the count or counts at common law there was not sufficient evidence of due care on the part of the plaintiff's intestate. The presiding justice, therefore rightly ordered a verdict for the defendant on all the counts of the declaration. *Fletcher v. Railroad Co.*, 149 Mass. 127, 21 N. E. 302; *Tully v. Railroad*, 134 Mass. 499. Exceptions overruled.

NOTE.

Death of Person on Track—Showing Due Care on Part of Deceased.—Where the action is for causing death, to warrant the submission of the case to the jury, it is not enough merely to show the negligence of the defendant, but there must also be evidence of due care on the part of the deceased, such as to warrant the jury in finding the absence of contributory negligence. *Peaslee v. Chatham*, 69 Hun (N. Y.) 389.

Where a person has been killed at a railroad crossing, and there are no witnesses of the accident, to authorize a recovery against the railroad company the circumstances must be such as to show that the deceased exercised proper care for his own safety. Where the circumstances point just as much to negligence on his part as to its absence, or point in neither direction, a recovery cannot be had against the railroad company. *Cordell v. New York C. & H. R. R. Co.*, 75 N. Y. 330.

Boyden v. Fitchburg R. Co

BOYDEN

v.

FITCHBURG R. Co.

(*Supreme Court of Vermont, Jan. 22, 1898.*)

Accident to Traveler on Track—Action by Next of Kin.—Under the law of Vermont the next of kin can maintain an action for the negligent killing of his intestate though deceased survived the accident for a short period.

Same—Expectation of Pecuniary Benefit.—In such action it is not necessary that the next of kin, the plaintiff, should have had a legal claim upon deceased, for service or support, it being only necessary for him to show that he had a reasonable expectation of deriving some pecuniary advantage from deceased, and the destruction of such expectation is a sufficient cause of action.

Same—Pleading.—Pleas which only allege that which is merely matter of evidence are bad as special issues.

Negligence—Violation of Sunday Law by Deceased.*—Defendant in such action is not relieved from liability merely because deceased at the time of the accident was traveling on Sunday in violation of the statute.

EXCEPTIONS by defendant from Windham county court. *Reversed in part.*

Waterman, Martin & Hitt, for plaintiff.

Batchelder & Bates, for defendant.

MUNSON, J. The only question made as to the sufficiency of the declaration is based upon the theory that the action cannot be maintained if the injured person survived for the shortest period of time. An examination of *Legg v. Briton*, 64 Vt. 652, 24 Atl. 1016, will show that this view is unfounded. The plaintiff claims that the fifth and sixth pleas are dilatory in their nature, and should have been dismissed because filed out of time; but claims further that, if the pleas are considered, they do not answer the declaration. We think the

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pleas are to be treated as pleas in bar, and that as such they are insufficient. They are drawn upon the theory that there can be no recovery unless the deceased owed his father some duty at the time of his death.

Same—Expecta-
tion of Pecuniary
Benefit.

But it is not necessary that the next of kin should have had a legal claim upon the deceased for service or support. It may be shown that there was a reasonable expectation of deriving some pecuniary advantage from the deceased, and the destruction of such expectation will sustain the action. *Rowe v. Moses*, 67 Am. Dec. 568, note; *Railway Co. v. Goodykoontz* (Ind. Sup.) 12 Am. St. Rep. 378, note (s. c. 21 N. E. 472); *Franklin v. Railway Co.* 3 Hurl. & N. 211, 8 Eng. Ruling Cas. 419, and note.

It is claimed that the seventh and eighth pleas are bad, as amounting to the general issue. The defendant meets this claim by saying that they are special issues. A special issue consists of a direct denial of some material and traversable allegation, never advances new matter, and concludes to the country. *Kimball v. Railroad Co.*, 55 Vt. 95. The declaration alleges that the intestate and the driver of the team were in the exercise of due care at the time of the accident. The pleas in question allege various facts and circumstances tending to show that they were not in the exercise of due care; and, as an inference from those facts and circumstances, it is further alleged that neither of them was in the exercise of due care, but that both were guilty of contributory negligence. The pleader probably regarded these pleas as advancing new matter, and not as mere denials of the allegation of due care, for he concludes them with a verification instead of to the country. Treating them as new mat-

Same—Pleading.

ter, they are bad, as amounting to the general issue, as such matter is in denial of what the plaintiff would be bound to prove on the general issue in order to support his case. 1 Chit. Pl. 527; Gould, Pl. c. 6, § 78; *Kimball v. Railroad*, above cited; *Burton v. Bostwick*, Brayt. 195; *Martin v. Woods* 6 Mass. 6; *Thayer v. Brewer*, 15 Pick. 217; *Bank of*

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Auburn v. Weed, 19 Johns. 300; Sinclair v. Hervey, 2 Chit. 642. But, if the pleas are to be treated as not advancing new matter and therefore not bad as amounting to the general issue, yet they are bad as special issues, for they allege that which is matter of evidence merely, and conclude with a verification. Kimball v. Railroad Co., above cited; Dowman's Case, 9 Coke, *9b. It is said in case last cited that "evidence shall never be pleaded, because it tends to prove matter in fact, and therefore the matter in fact shall be pleaded, and, if that is denied, the evidence is to be given to the jury, and not to the court." These questions regarding the seventh and eighth pleas are disposed of without inquiring as to the proper manner of taking advantage of defects of this character. See Kimball v. Railroad Co., above cited.

The fourth plea is not double. It does not allege negligence on the part of the plaintiff otherwise than as shown by his traveling on Sunday. It thus becomes necessary to inquire whether the defendant is relieved from liability by the fact that the plaintiff was traveling in violation of the statute. The question presented has been decided differently in different states. Duran v. Insurance Co., 63 Vt. 437. It is held in this state that one so traveling cannot recover of the town for injuries sustained through an insufficiency of the highway (Johnson v. Irasburgh, 47 Vt. 28), but this is put upon the ground that a town is under no obligation to provide a safe road for such a traveler; and in considering the grounds on which the decisions of other states are based the court expressed its approval of the reasoning adopted by those which held that recovery may be had. It was thought to be difficult to maintain that the traveler's illegal act contributes to the injury, or that his being engaged in an unlawful act bars his recovery. We have no disposition to ignore the views expressed in the reasoning of that opinion, and, if this plea is sustained, it must be upon the ground that the defendant owed no duty to one traveling upon the highway in violation of the statute. But we think it cannot

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be said that a railroad company owes no duty whatever to one who is crossing its track on the Sabbath. As a traveler in violation of the statute, he should stand no worse than an ordinary trespasser, and a railroad company owes a trespasser at least the duty not willfully to run over him. There is nothing in the reasoning of the opinion in *Johnson v. Irasburgh* that would have prevented a recovery if the town authorities had been repairing the road on the Sabbath, and had willfully run their road machine upon the plaintiff. It might easily be considered that the defendant company owed the plaintiff no duty as regards the safety of the crossing, and yet be held that it owed him some duty as regards the running of its train. It is not necessary to examine the subject further in disposing of these pleas. They do not necessarily answer the count, and so must be held insufficient.

That part of the judgment dismissing the fifth and sixth pleas is reversed, and those pleas are adjudged bad on demurrer. In all other respects the judgment is affirmed. Cause remanded.

START, J., dissents on the first point.

NOTES.

Wrongful Death—Expectation of Pecuniary Benefit as Cause of Action.—If there be a reasonable expectation of pecuniary advantage from a person bearing the family relation, the destruction of such expectation by negligence occasioning the death of the party from whom it arose, will sustain an action. *Pennsylvania R. Co. v. Adams*, 55 Pa. St. 499. *Grotenkemper v. Harris*, 25 Ohio St. 510; *Pym v. Great Northern R. Co.*, 4 B. & S. 396; 10 Jur. N. S. 199, 32 L. J. Q. B. 377, 11 W. R. 922, 8 L. T. 734; *affirming* 2 B. & S. 759, 8 Jur. N. S. 819, 31 L. J. Q. B. 249, 10 W. R. 737, 6 L. T. 537.

If the only pecuniary benefit a person had in the life of the deceased was derived from a contract with him, such person cannot sue. *Sykes v. North Eastern R. Co.*, 44 L. J. C. P. 191, 23 W. R. 473, 32 L. T. 199.

Effect of Violation of Sunday Laws in Case of Negligent Injury.—Statutes providing for the observance of Sunday frequently contain prohibitions against traveling on Sunday, and the question has arisen as to the effect of a violation of these provisions upon one's right to recover for injuries sustained while so traveling. It is a well-accepted principle governing the law relating to recovery for

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negligent injury that when the negligence of the defendant has been established as a proximate cause of the injury, the plaintiff will not be precluded from recovery unless it can be shown affirmatively that his own conduct actually and approximately contributed to the injury. It would seem, therefore, that the mere fact that one was traveling in violation of the Sunday statute will not alone and of itself bar his right to recover for injuries received while so traveling. And this is the doctrine generally announced. *Sutton v. Wauwatosa*, 29 Wis. 21; 9 Am. Rep. 534; *Platz v. Cohoes*, 89 N. Y. 219; 42 Am. Rep. 286; *aff'g* 24 Hun (N. Y.) 101; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126; 17 Am. Rep. 221; *aff'g* 65 Barb. (N. Y.) 32; *Baldwin v. Barney*, 12 R. I. 392; 34 Am. Rep. 670; *Dutton v. Weare*, 17 N. H. 34; 43 Am. Dec. 590; *Morris v. Litchfield*, 35 N. H. 271; 69 Am. Dec. 546; *Johnson v. Missouri Pac. R. Co.*, 18 Neb. 690; 23 Am. & Eng. R. Cas. 429; *Schmid v. Humphrey*, 48 Iowa 652; 30 Am. Rep. 414; *Smith v. New York, etc., R. Co.*, 46 N. J. L. 7; 18 Am. & Eng. R. Cas. 399; *Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co.*, 23 How. (U. S.) 209; *Powhatan Steamboat Co. v. Appomatox R. Co.*, 24 How. (U. S.) 247; *Chicago, etc., R. Co. v. Graham* (Ind. App. 1892), 29 N. E. Rep. 170; *Houston, etc., R. Co. v. Rider*, 62 Tex. 267; *Cooley on Torts*, 156; 2 *Wood on Railways*, 1248; *Beach on Contributory Neg.*, §§ 61, 81; *Bigelow on Torts*, p. 309; *Shearm. & Red. on Neg.*, § 104; *Wharton on Neg.*, § 321.

In *Mohney v. Cook*, 26 Pa. St. 349; 67 Am. Dec. 422, the court, by *Lourie, J.*, said: "We should work a confusion of relations, and lend doubtful assistance to morality, if we should allow one offender against the law to set off against the plaintiff that he is a public offender." *Hendrick v. Jones*, 5 Port. (Ala.) 208.

A steamboat illegally running on Sunday came in contact with pilings unlawfully left in navigable waters and was damaged. In a suit against the company through whose negligence the pilings had been left there the plaintiff was allowed to recover, the court, by *Grier, J.*, saying: "The law relating to the observance of Sunday defines the duty of a citizen to his state and to his state only. For a breach of this duty he is liable to the fine or penalty imposed by the statute and nothing more. Courts of justice have no authority to add to this penalty the loss of the ship by the tortious conduct of another against whom the owner has committed no offense." *Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co.*, 23 How. (U. S.) 209. This case has been followed in *Powhatan Steamboat Co. v. Appomatox R. Co.*, 24 How. (U. S.) 247; *Mohney v. Cook*, 26 Pa. St. 342; 67 Am. Dec. 419; *Com. v. Rees*, 10 Pa. Co. Ct. Rep. 545; 22 *Pitts. L. J.*, N. S. 189; *Louisville, etc., R. Co. v. Buck*, 116 Ind. 566; 38 Am. & Eng. R. Cas. 152, and the doctrine therefore seems firmly established. See also *McDonough v. Metropolitan R. Co.*, 137 Mass. 210.

The liability of a railroad or other company for injuries inflicted while running on Sunday is to be determined by the same rules as if the accident had occurred on a secular day. *Tingle v. Chicago, etc., R. Co.* 60 Iowa 333. And this seems to state the correct doctrine.

But a very proper modification is stated in *Hyde Park v. Gay*, 120 Mass. 589, where it is said that a railroad company running its train on Sunday in violation of the statute is held to a stricter accountability for accidents at crossings of highways, for the reason that

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the public is entitled to presume that the company will obey the law and not run its trains.

A common carrier is not relieved from liability because the contract for carriage was made on Sunday. His liability does not rest in contract alone, but is one imposed by law. *Merritt v. Earle*, 29 N. Y. 115; 31 Barb. (N. Y.) 38; 86 Am. Dec. 292.

In Massachusetts, however, it is held that an engineer on a locomotive engine who was performing the ordinary duties of his employment on Sunday, is laboring in violation of the Mass. Pub. Stats., C. 98 § 2, unless the running of the train on which he is employed is a work of necessity or charity; and if it is not, and while so laboring he is injured by a defect in the railroad track, his illegal act necessarily contributes to cause his injury and precludes his maintaining an action therefor. Read *v. Boston & A. R. Co.*, 140 Mass. 199.

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v.

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(*Court of Appeals of Kentucky, Feb. 16, 1898.*)

Death of Employee—Agreement to Set Aside Will—Order of County Court.—An agreement by all the parties in interest will justify a county court in setting aside its order entered at a former term admitting a will to probate; and an administrator appointed by the court in accordance with such agreement can maintain a suit for the wrongful killing of his decedent.

Same—Negligence—Question for Jury.—In an action against a railroad company to recover for the death of plaintiff's decedent alleged to have resulted from the gross negligence of defendant's foreman, it appeared that decedent's death resulted from a fall from a trestle, which he was repairing under the direction of defendant's foreman; that there was evidence tending to show negligence on the part of the foreman, but also evidence tending to show contributory negligence on the part of decedent. *Held*, that it was not error to refuse to direct a verdict for defendant.

Same—Damages—Sufferings of Deceased.*—In such action plaintiff was not entitled to recover damages on account of the mental and physical suffering of decedent.

Same—Punitive Damages.*—The jury was not authorized to find punitive damages under the facts of the case.

Same—Assumption of Facts.—An instruction containing assumptions of facts by the court not warranted by the evidence is erroneous.

*See notes at end of case.

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APPEAL by defendant from Nelson county circuit court. *Reversed.*

John S. Kelley, for appellant.

Nat W. Halstead, for appellee.

BURNAM, J. This action was brought by appellee, as administrator of John W. Sanders, deceased, for the recovery of damages for the death of his decedent, resulting from the gross negligence of the foreman of a gang of bridge carpenters in the employ of appellant. It became necessary to repair a trestle on appellant's road over Stinking creek, by supplying new legs, the old ones having become defective from use; and plaintiff alleges that while engaged in this work his decedent was directed by the foreman in charge of the crew to go on top of the trestle, and take charge of a guy line which was attached to the leg that was being removed, it being his duty to slack the leg to the ground by means of the guy line, which was wrapped around one of the cross-ties of the trestle; that while the foreman and the remainder of the crew were on the ground prizing out the leg and replacing it, they, without notice to decedent, threw the leg down, and jerked decedent off the trestle, throwing him a distance of about 20 feet to the ground, and inflicting injuries from which, after great suffering both in mind and body, he died about two months later, after having executed a will, which was duly probated and admitted to record after his death, although its probation was resisted by the widow of deceased. Subsequently to the probation of this will all the devisees thereunder came into the county court, and filed a written agreement renouncing the provisions made for them, and agreeing that the will and the order probating same be set aside and held for naught, and that the agreement be recorded in the Nelson county court clerk's office, and agreeing that the executor named in the will might be appointed administrator of decedent. After the filing

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—Agreement to
Set Aside Will—
Order of County
Court.

of this paper, by consent of all parties in interest, the order appointing the executor was set aside, and the same person was appointed administrator. Defendant first filed a plea in abatement, insisting that the appointment of the plaintiff as administrator was null and void, as the county court had no jurisdiction to make the appointment, and that the administrator had no authority under the appointment to maintain this suit, and insisting that the will was still in full force and effect, and answered denying the allegations of negligence on the part of the foreman, and alleging that decedent fell or was thrown from the trestle wholly and alone on account of his own negligence and carelessness. Upon the trial a verdict and judgment was rendered in favor of plaintiff for \$4,000, and on this appeal we are required to consider certain errors complained of.

The first of these is the ruling of the court on the plea in abatement. While we are willing to concede that, after a will has been admitted to record or rejected, the county court has no power at a subsequent term to annul the orders made in reference to the case at a previous term, in the face of objections by parties in interest, no reason has been suggested why all parties interested as heirs at law of a decedent and his devisees under his will cannot voluntarily come into the county court and have entered an agreement consenting that the order probating the will, which was entered at a former term, be set aside, and the provisions of the will itself disregarded; and such an agreement would justify the county judge in entering the necessary orders to carry out the provisions of the agreement of the parties in interest. Certainly appellant could not have been prejudiced by such an order. This is a suit by a personal representative,—a personal representative appointed at the instance of all the parties in interest,—and we think he has the right to maintain this action, and that the plea in abatement was properly overruled.

It is urged as a reversible error that the proof of

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appellee entirely fails to sustain the allegations of the petition; that the facts of the record show that the accident was occasioned solely by the negligence of the decedent in putting the guy rope around the tie on the outside of the guard rail, where it was liable to slip off, and in getting himself so near the edge of the trestle; that, if the turn of the rope had been around either the guard rail itself or on the tie on the inside of the guard rail, it would have been impossible for the accident to have happened, and that decedent, an experienced bridge carpenter, who was thoroughly familiar with the proper manner in which this work should be done, elected to pursue the dangerous course without the direction of the foreman or any body else. And there is great force in this contention, and it is possible that the accident occurred by the fault of decedent; but it must be borne in mind that this was the third leg of the trestle that had been removed in the same way, and the manner in which decedent was doing the work was presumably with the knowledge and approval of the foreman in charge of the crew; and, while the evidence of negligence on the part of the foreman is by no means conclusive, yet, in view of the testimony of William and John Woodson, as to his failure to observe the request of decedent to "hold on, and not shove the leg out of the groove," just before the decedent fell off the trestle, we do not feel authorized to say that there is such failure of proof as would justify this court in reversing the judgment complained of because the lower court refused to give a peremptory instruction to find for defendant.

Same—Negligence
—Question for
Jury.

Another error complained of is the giving of instruction No. 1 at the instance of the plaintiff, which was excepted to, by which the jury were told that "if they believed from the evidence that the decedent, Sanders, was in the employ of defendant as a bridge carpenter, and while so employed was called by his superior and foreman in charge of the bridgework to go to work on

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the top of defendant's trestle, or the proper discharge of his work called him to the top of said trestle, where he was at work under the order of said foreman, and while so employed was jerked off of said trestle by the gross negligence of the other employes, superior in authority to decedent, of defendant, at work on the said trestle, and was thereby thrown to the ground, a distance of about twenty feet, and injured and hurt, from which injuries and wounds he subsequently died, then the jury will find for plaintiff such damages as they may deem proper from all the facts and circumstances proven in the case, not exceeding the amount claimed in the petition, \$25,000." The appellee was permitted to prove by the physician who attended decedent his condition from day to day, and to detail his sufferings prior to his death, and the petition itself avers, not only the death of appellee's intestate by the gross negligence of appellant, but also alleges specifically that "he was long sick, suffering greatly in body and mind," although the petition seeks recovery only for the death of decedent. By this instruction the jury were authorized to consider, in arriving at a verdict, every possible fact and circumstance which had been permitted

Same—Damages—
Sufferings of De-
ceased.

to be proven in the case, and this, we think, allowed them to find damages for the mental and physical suffering of the deceased, which this court, in a number of cases has held to be improper. See Conner's Adm'r v. Paul, 12 Bush, 144; Hackett v. Railroad Co., 95 Ky. 236, 24 S. W. 871; Railroad Co. v. McElwain, 98 Ky. 700, 34 S. W. 236; and Railroad Co. v. Barclay's Adm'r (Ky.) 43 S. W. 177. This instruction also left the jury at liberty to find punitive damages, which was not authorized under the facts of this case. It is also objectionable

Same—Punitive
Damages.

because the jury were told that, "if they believed the proper discharge of his work called the decedent to the top of the trestle, that he was there at work under the orders of the foreman." The pleadings and proof both make an issue as to whether the work

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he was engaged in was by direction of the foreman, and if, as a matter of fact, decedent sustained the injuries which caused his death by reason of the negligent manner in which he performed his work, no recovery can be had, unless the discharge of that duty was in the manner directed by the foreman; and, in addition, it leaves the jury to infer that there were other employes present besides the foreman who were decedent's superiors in authority, under whose direction he might have acted. Under the proof in the case there was but one employe of the company present who was superior in authority to deceased, or had any power to control his actions, and that was the foreman; and evidently no recovery could be had except for negligent acts or orders on his part, as this court has often held that an employer is not liable to a servant for injuries sustained by him through the gross neglect of a fellow servant, where both servants are of the same rank, and engaged in the same field of labor. See *Casey's Adm'r v. Railroad Co.*, 84 Ky. 82; *Railroad Co. v. Cavens' Adm'r*, 9 Bush, 565; and *Volz v. Railway Co. (Ky.)* 24 S. W. 119. Yet under the instruction given the jury might have felt themselves authorized to find a verdict against defendant because of the gross negligence of any of the employees whom they might consider in authority over deceased. For the reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

Same—Assump-
tion of Facts.

NOTES.

Death by Wrongful Act—Damages—Sufferings of Deceased.—Where the action is under the Iowa statute, nothing can be allowed for the wounded feelings or grief of the relatives, nor for the pain and suffering of the deceased. *Kelley v. Central R. Co.*, 48 Fed. Rep. 663. *Dwyer v. Chicago, St. P. & O. R. Co.*, 84 Iowa 479, 51 N. W. Rep. 244.

Where the action is under the Louisiana Code, to recover for the death of one by drowning, the sufferings of the deceased, between the time of falling into the water and that of drowning, are deemed simultaneous with the death, and therefore cannot be taken into account in assessing the damages. *Cheatham v. Red River Line*, 56 Fed. Rep. 248.

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Where the action is under the Massachusetts statute for causing death, and the evidence shows that the deceased fell some twenty feet, and upon striking became unconscious, and remained so until the time of his death, there can be no recovery for the physical or mental suffering endured by the deceased during the fall. *Kennedy v. Standard Sugar Refinery*, 125 Mass. 90.

In an action under How. (Mich.) Stat. § 8314, by personal representatives for the death of their decedent, the mental sufferings and injured feelings, or any other injuries not susceptible of being compensated for by a money consideration to the beneficiaries, under the statute, should be excluded by the jury in determining the amount of damages. *Mynning v. Detroit, L. & N. R. Co.*, 23 Am. & Eng. R. Cas. 317, 59 Mich. 257, 26 N. W. Rep. 514.

Negligence of Servants—Exemplary Damages.—A corporation cannot be held liable for punitive damages for the gross negligence of its servants merely. To make it liable for such damages it must knowingly employ incompetent, drunken, or reckless servants; or they should act with a reckless, wanton disregard for the safety of others. *Illinois C. R. Co. v. Hammer*, 72 Ill. 347; *Quinn v. South Carolina R. Co.*, 37 Am. & Eng. R. Cas. 166, 29 So. Car. 381, 7 S. E. Rep. 614, 1 L. R. A. 682.

A Corporation, by the malicious misconduct of its servants acting within the scope of their employment, may render itself liable to exemplary or punitive damages; but this doctrine being capable of great practical abuse, the giving it in charge to the jury in a case clearly not warranting its application tends to mislead them; and where, in such a case, a verdict of damages is obviously exorbitant, it is error in the court to refuse to set it aside and award a new trial. *Pittsburg, Ft. W. & C. R. Co. v. Slusser*, 19 Ohio St. 157; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202.

Exemplary damages may be recovered against a company where an injury is wantonly inflicted by its servants, by way of mere punishment to the tortfeasor, regardless of the amount of damages actually sustained. *Lake Erie & W. R. Co. v. Christison*, 39 Ill. App. 495.

And it makes no difference that the acts resulting in the injury may not have been previously authorized or subsequently ratified by the company. *Philadelphia Traction Co. v. Orbann*, 34 Am. & Eng. R. Cas. 432, 119 Pa. St. 37, 11 Cent. Rep. 628, 12 Atl. Rep. 816, 21 W. N. C. 76.

Juries are authorized to give exemplary damages in case of wanton and reckless negligence, as well as for forcible injuries caused by the company's servants; and it is not error for the court in such cases so to instruct the jury. *Kountz v. Brown*, 16 B. Mon. (Ky.) 577.

But an instruction that the plaintiff may recover exemplary damages provided the defendant was wantonly or wilfully negligent, without also submitting the question of contributory negligence on the plaintiff's part, is erroneous. *Indianapolis & St. L. R. Co. v. Willis*, 8 Ill. App. 242.

A company cannot be held liable for exemplary damages unless shown by the evidence to have been itself guilty of gross negligence; mere negligence or wilful acts of the company's servants in the course of their employment do not justify such damages. *Fisher v. Metropolitan El. R. Co.*, 34 Hun (N. Y.) 433.

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A company is not liable in exemplary or punitive damages except where the acts of its agents which brought about the injuries are wanton or malicious. *Doss v. Missouri, K. & T. R. Co.*, 59 Mo. 27, 8 Am. Ry. Rep. 462.

A company cannot be held liable for exemplary damages for injuries caused by the act of a servant, even though wanton and malicious, unless expressly or impliedly authorized or ratified by the company. *Ricketts v. Chesapeake & O. R. Co.*, 41 Am. & Eng. R. Cas. 42, 33 W. Va. 433, 7 L. R. A. 354, 10 S. E. Rep. 801.

A company cannot be charged with punitive or exemplary damages for the illegal, wanton, and oppressive conduct of a conductor of one of its trains towards a passenger. *Lake Shore & M. S. R. Co. v. Prentice*, 58 Am. & Eng. R. Cas. 436, 147 U. S. 101, 13 Sup. Ct. Rep. 261.

Though, under the Texas statute, actual damages may be recovered for death caused by the unfitness, gross negligence, or carelessness of the servants or agents of a railway company, as well as for the negligence or carelessness of the proprietor, owner, charterer, or hirer, yet exemplary damages will be allowed only for the wilful act, omission, or gross negligence of the "defendant" to the suit, for the wilful act, omission, or gross negligence of one representing the corporation in its corporate capacity, not a mere ordinary agent or servant. *Houston & T. C. R. Co. v. Cowser*, 57 Tex. 293.

Exemplary damages, or smart-money, are not recoverable unless it appears that the conduct of the company's servant was not only malicious in expelling plaintiffs from the cars, but that his act was authorized or sanctioned by the company. Vindictive damages cannot be recovered against a principal for malicious acts of the agent, where there is no evidence to show any authority for ratification of the particular act alleged to be malicious. *Milwaukee & M. R. Co. v. Finney*, 10 Wis. 388.

To render a corporation in Texas liable for exemplary damages it must be shown that the officers by whom it was controlled had been guilty of fraud, malice, gross negligence and oppression; and when the injury is caused by its servants it is not liable for the malicious acts of such servants, unless ratified or accepted by it. Under this rule, a traveler on the highway who is delayed by a train on the track where the highway and railroad cross, is not entitled to claim exemplary damages, unless the evidence shows that the delay was due to the wilful and intentional act of the company, and that it was aggravated by fraud, malice, gross negligence, or oppression, or that it was authorized, ratified, or approved by the company. *Texas & P. R. Co. v. Self*, 2 Tex. App. (Civ. Cas.) 387.

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SPENCER *et al.**(Supreme Court of Colorado, Feb. 7, 1898.)*

Injury to Licensee at Depot—Evidence—Res Gestæ.—In an action against a railroad company for the killing of plaintiffs' father, which resulted from a collision while he was standing upon its depot grounds, evidence of a conversation which he had held a few days prior to the injury, in which he was heard to make arrangements to meet a passenger expected to arrive on one of defendant's trains at about the time of the injury, was admissible as part of the *res gestæ* to show the purpose for which he was on the depot grounds.

Contributory Negligence—Error.—While instructing that a certain degree of contributory negligence on the part of deceased would prevent recovery, unless defendant was willfully or wantonly reckless, the court should have stated the particular circumstances under which such conduct on the part of defendant absolves the injured party from the consequences of his contributive act.

Assumption of Fact—Erroneous Instruction.—An instruction which assumes the existence of evidence which was not introduced is erroneous.

Measure of Damages.*—The proper measure of damages in such action, under the law of Colorado, is a sum equal to the net pecuniary benefit which plaintiffs might reasonably have expected to receive from the deceased in case his life had not been terminated by the wrongful act, neglect or default of defendant.

Same.—Deceased, at the time of his death, was 68 years old, and nearly his entire income was consumed by his living expenses. *Held*, that the jury were not controlled by the evidence in estimating the amount that plaintiffs were entitled to recover at \$5,000.

APPEAL by defendant from Arapahoe county district court. *Reversed and remanded.*

This is an action brought by Henry C. Spencer, Louis E. Spencer, and Mary E. Dudley to recover damages for the death of their father, Charles H.

Case Stated. Spencer, alleged to have been caused by the negligence of the Denver & Rio Grande Railroad Company. It appears that on August 16, 1892, the deceased went to the depot of defendant company at

*See note at end of case.

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Colorado Springs to meet his daughter-in-law, who was expected to arrive from Denver on the south-bound train, which was due at that place on the afternoon of that day. There are several tracks running north and south in front of the depot, the ground between them being planked over. At the time of the accident a Rock Island train stood upon the second track from the depot, facing north. The employees of defendant company had left a baggage truck standing between this train and the next track east. A train of defendant company coming in from the north on this track, struck the truck, throwing it against and upon deceased, inflicting injuries that caused his death. The trial resulted in a verdict and judgment for the sum of \$5,000, being the maximum amount allowed by the statute. To reverse this judgment the company prosecutes this appeal.

Wolcott & Vaile and *Henry F. May*, for appellant.

N. Q. Tanquary and *Henry Howard, Jr.*, for appellees.

GODDARD, J. (after stating the facts). Error is assigned upon the admission of certain evidence and the giving of certain instructions. For the purpose of showing that deceased was upon the depot grounds at the time the accident occurred to meet his daughter-in-law, who was expected to arrive on defendant's train, witnesses were permitted to testify, over defendant's objection, that they heard him make an arrangement to that effect with her a few days previous. Counsel for appellant insist that this testimony was mere hearsay, and therefore inadmissible. We do not so regard it. The conversation testified to was explanatory of, and so connected with, the act of deceased in going to the depot grounds on that particular occasion as to become a part of the *res gestæ*, and admissible as illustrative of that act. The circumstances under which the declaration was made excludes the idea that it was designed to serve any other than the purpose indicated, and we think

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clearly comes within the following definition of "*res gestæ*," as given by Mr. Wharton: "The *res gestæ* may be, therefore, defined as those circumstances which are automatic and undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist, as we will see, of sayings and doings of any one absorbed in the event, whether participant or bystander. They may comprise things left undone, as well as things done. Their sole distinguishing feature is that they must be the automatic and necessary incidents of the litigated act, necessary in this sense; that they are part of the immediate preparation for, or emanations of, such act, and are not produced by the calculated policy of the actors." Whart. Ev. § 259. We think this testimony was properly admitted. By the pleadings and the evidence, the question whether the deceased was guilty of contributory negligence was made an important issue in the case.

In instructions Nos. 12 and 13 the jury are told, in effect, that if they believed from the evidence that the deceased was guilty of negligence which contributed directly to the accident, then the plaintiffs could not recover, unless they further believed from the evidence that the conduct of defendant's servants was willfully or wantonly reckless.

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ligence - Error.

This direction is objectionable, because it fails to state the particular circumstances under which the wanton or reckless conduct of a defendant absolves the injured party from the consequences of his contributive act. It announces an exception or qualification of the prevailing doctrine of contributory negligence as being the general rule, and, in so doing, seems to recognize the rule of comparative degrees of negligence,—a doctrine that is not recognized in this jurisdiction. In other words, the rule announced is applicable only when, notwithstanding the contributory negligence of the injured party, the defendant's servants, after becoming aware of the danger to which he has exposed himself,

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might, by the exercise of ordinary care, have avoided the injury, and are "guilty of such conduct as will imply an intent or willingness to cause the injury." *Railway Co. v. Crisman*, 19 Colo. 30, 34 Pac. 286; *Transit Co. v. Dwyer*, 20 Colo. 132, 36 Pac. 1106. Instruction No. 14 recognizes this qualification, and in the main states the rule correctly, but is erroneous in limiting its application to a case where the injured party was guilty of slight negligence only. As before said, the rule of comparative degrees of negligence does not prevail in this state, and it is immaterial what the extent of the injured party's negligence may have been. If it contributed in any degree as the proximate cause of the injury, there can be no recovery; and, on the other hand his negligence, however gross, would not exempt the defendant from liability for an injury willfully and intentionally inflicted. These instructions are not only subject to the foregoing criticism, but are objectionable for the further reason that they are not based upon any evidence in the case. It does not appear from the testimony that any servant of the defendant saw the danger to which deceased was exposed in time to have averted it, or at all; while, on the other hand, it does appear that the truck was left standing parallel between the two tracks, and in such a position that the incoming train of defendant would have cleared it, had it not been moved; that in fact the engine and first coach did pass it, and it was struck by the forward end of the second coach. Mr. Ebert the engineer in charge of the engine, testified that he saw the truck; noticed the position of it in particular, when within 50 feet of it; drew the fireman's attention to it, and asked him if he thought it would clear; he said "Yes, he thought it would;" that he had his train under perfect control to stop, if the engine did not clear the truck; that his engine did clear it. He released the air brake, and the engine dropped down very slowly past the truck. Jeremiah Cronan, the fireman, testified that he was on the left-hand side of the engine, noticed the baggage

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struction.

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truck, knew where it was, and that the engine cleared it about a foot or more. There is no testimony that the deceased was near the truck at this time, or that the engineer saw him near it at any time. On the other hand, there is evidence to the effect that he approached the train at a rapid gait, and reached the truck after the engine had passed it; that he struck the truck, causing it to change its position, and collide with the front end of the second coach. To this state of facts the rule sought to be announced is inapplicable, and, if correctly given, would have been misleading, in that it assumes a state of facts not shown by the evidence. "The instructions should in all cases be based upon the evidence, and an instruction, no matter how correct the principle which it may announce, that impliedly assumes the existence of evidence which was not given, is erroneous." *Fisk v. Light Co.*, 3 Colo. App. 319, 33 Pac. 70; *Railroad Co. v. Liehe*, 17 Colo. 281, 29 Pac. 175.

Measure of Dam-
ages. Error is also assigned upon the giving of the following instruction: "(16) You are further instructed that it is provided by a statute in this state that whenever the death of a person shall be caused by the wrongful or negligent act of another, and the act is such as would, if death had not ensued, have entitled the party injured to have maintained an action to recover damages in respect thereof, then the person who, or the corporation which, would have been liable if death had not ensued, shall be liable for an action for damages. It is further provided by said statute that under such circumstances the children of the deceased may sue in their own name, to recover such damages as the jury may deem fair and just, as shown by the testimony, not exceeding \$5,000." The language of the statute referred to is: "And in every such action the jury may give such damages as they may deem fair and just, not exceeding \$5,000, with reference to the necessary injury resulting from such death to the surviving parties who may be entitled to sue." Gen. St. § 1032 (Mills' Ann. St. § 1510). It has been frequently held by this court that the recov-

ery authorized by this statute is purely compensatory, and is limited to the pecuniary loss resulting from the death to the party who may be entitled to sue. As was said in *Pierce v. Conners*, 20 Colo. 178, 37 Pac. 721: "The true measure of compensatory relief in an action of this kind, under the act of 1877, is a sum equal to the net pecuniary benefit which plaintiff might reasonably have expected to receive from the deceased in case his life had not been terminated by the wrongful act, neglect, or default of the defendant. * * * But it must be borne in mind that the recovery allowable is in no sense a solatium for the grief of the living occasioned by the death of the relative or friend, however dear. It is only for the pecuniary loss resulting to the living party entitled to sue, resulting from the death of the deceased, that the statute affords compensation." The instruction as given omits this important limitation, and leaves the jury at liberty to find any amount that they might deem fair and just, not exceeding the maximum of \$5,000, regardless of the fact whether the plaintiffs suffered any pecuniary loss by the death of the deceased or not. That the jury were misled by this instruction, notwithstanding the rule as to the measure of damages was correctly stated in instruction No. 11, we think is apparent from an examination of the evidence introduced upon this subject. It appears therefrom that the plaintiffs were adult children of deceased, and his sole surviving heirs, his widow having died after the accident and before the commencement of the suit. Neither of them derived any support from the deceased. Therefore the pecuniary loss, if any, that resulted to them by reason of the death, was in being deprived of their share of the money that he might accumulate during his expectancy of life. The evidence though somewhat meager, is to the effect that deceased, at the time of his death, was 68 years of age, and was receiving a salary of \$1,500 a year as cashier of a bank, and the sum of \$500 a year as notary and conveyancer in connection with the bank, and was receiving an income from dividends on bank stock and real estate investments of about

Same.

Note

\$1,500 per annum. From all of these sources he was deriving a net income of from \$1,500 to \$1,700 a year. In estimating the probable savings that the deceased would have accumulated, but for his premature death, the income received from his investments should not be considered, since these investments passed to plaintiffs upon his death, and they came into the immediate enjoyment of the income therefrom. *Railway Co. v. Jennings*, 13 App. Cas. 800; *Pym v. Railway Co.*, 2 Best & S. 759; *Id.*, 4 Best & S. 396. The only income, therefore, that was cut off by the premature death of deceased, from which plaintiffs might expect to have derived any pecuniary benefit, was his personal earnings, which it appears, were nearly, if not quite, consumed by his expenses of living. It is therefore evident that the jury were not controlled by the evidence in estimating the amount that plaintiffs were entitled to recover. For the foregoing reasons the judgment is reversed, and the cause remanded for a new trial. Reversed and remanded.

CAMPBELL, C. J., not sitting.

NOTE.

Death by Wrongful Act—Measure of Damages.—The damages for death by negligence are the pecuniary loss sustained by the parties entitled to maintain the action. *Caldwell v. Brown*, 53 Pa. St. 453. *Gaither v. Kansas City, etc., R. Co.*, 27 Fed. Rep. 544.

Under the Ill. St. of 1874 a recovery is limited to the financial or pecuniary loss by the death of the deceased. Expenses incurred or paid for medical attendance, care, and nursing, or otherwise, in the endeavor to effect a cure, the agony and pain suffered by the injured party, the loss of earnings while sick, or the disability by the injury cannot be considered in estimating the amount of damages. The sole measure of damages is the pecuniary loss of the widow and next of kin, occasioned by the destruction of the life of the deceased person. *Maney v. Chicago, B. & Q. R. Co.*, 49 Ill. App. 105.

In an action by an administrator to recover for injury to the estate of his intestate, whose death was caused by the negligence of the company's employes, the measure of damages is the amount which will compensate the estate for the pecuniary loss sustained by the death of the deceased. *Rose v. Des Moines Valley R. Co.*, 39 Iowa 246, 9 Am. Ry. Rep. 7, 20 Am. Ry. Rep. 326.—*Quoted in Dwyer v. Chicago, St. P. & O. R. Co.*, 84 Iowa 479.

Note

In an action under How. Stat. §§ 3391, 3392, for the negligent killing of plaintiff's intestate the damages recoverable are limited to the pecuniary injury sustained by the persons entitled to share in the distribution of his personal estate, which distribution is governed by the statute existing at the time of the death of the intestate. *Richmond v. Chicago & W. M. R. Co.*, 49 Am. & Eng. R. Cas. 367, 87 Mich. 374, 49 N. W. Rep. 621. *Van Brunt v. Cincinnati, J. & M. R. Co.*, 78 Mich. 530, 44 N. W. Rep. 321; *Hurst v. Detroit City R. Co.*, 84 Mich. 539, 48 N. W. Rep. 44.

In case of a verdict in favor of the plaintiff he is entitled to recover such a sum as the jury may deem, from the evidence, a fair and just compensation to the next of kin for the pecuniary loss sustained by them, resulting from the death which is made the basis of the suit, not exceeding the statutory amount. *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95, 52 N. W. Rep. 840.

The measure of damages, under the Pa. Act of April 26, 1855, where death results through negligence, is such compensation only as the evidence shall clearly prove to have been pecuniarily suffered by the surviving relatives—in this case by the widow and children of the deceased. *Huntingdon & B. T. R. & C. Co. v. Decker*, 84 Pa. St. 419.

The language of the statute (Paschal's Dig. 16), "damages proportioned to the injury resulting from such death," is the same as in the English statute, and it is well settled that the damages given by such statutes are measured by the pecuniary injury to the respective parties entitled, including the loss of prospective advantage. *March v. Walker*, 48 Tex. 372.

The measure of damages is not the same as when a party himself sues for injuries received, and recovers compensation for physical and mental suffering. *March v. Walker*, 48 Tex. 372.

The wealth of a defendant cannot be taken into consideration, in arriving at the measure of compensation for the pecuniary loss suffered. The amount of the loss must be settled by proof. *Conant v. Griffin*, 48 Ill. 410.

The action, being a creature of the statute, must be governed by its provisions, and they provide only for compensatory damages, or approximate thereto, not for vindictive or exemplary damages. The verdict cannot exceed the amount of the loss proved. *Conant v. Griffin*, 48 Ill. 410.

In an action to recover damages for the death of a relative, caused by negligence, sorrow and mental anguish caused by the death are not elements of damage, and nothing can be recovered as *solatium* for wounded feelings, and the loss of society can only be considered for the purpose of estimating the pecuniary loss. *Morgan v. Southern Pac. Co.*, 54 Am. & Eng. R. Cas. 101, 95 Cal. 510, 30 Pac. Rep. 603.

Louisville & N. R. Co. v. Orr., 91 Ala. 548, 8 So. Rep. 360; *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442, 20 Am. Ry. Rep. 245; *Chicago, B. & Q. R. Co. v. Harwood*, 80 Ill. 88. *Chicago City R. Co. v. Gillam*, 27 Ill. App. 386; *Morris v. Chicago, M. & St. P. R. Co.*, 26 Fed. Rep. 22. *Baltimore & O. R. Co. v. State*, 21 Am. & Eng. R. Cas. 202, 63 Md. 135; *Baltimore & R. Turnpike Road v. State*, 71 Md. 573, 18 Atl. Rep. 884; *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286, 12 West. Rep. 615, 6 S. W. Rep. 464; *Holmes v. Oregon & C. R. Co.*, 5 Fed. Rep. 523, 6 Sawy. (U. S.) 262; *Carleson v. Oregon S. L. & U. N. R. Co.*

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53 Am. & Eng. R. Cas. 135, 21 Oreg. 450, 28 Pac. Rep. 497; Pennsylvania R. Co. v. Vandever, 36 Pa. St. 298; Caldwell v. Brown, 53 Pa. St. 433; Pennsylvania R. Co. v. Butler, 57 Pa. St. 335; McGown v. International & G. N. R. Co., 85 Tex. 289, 20 S. W. Rep. 80; Pym v. Great Northern R. Co., 4 B. & S. 396, 10 Jur. N. S. 199, 32 L. J. Q. B. 377, 11 W. R. 922, 8 L. T. 734; Canadian Pac. R. Co. v. Robinson, 14 Can. Sup. Ct. 105.

LOUISVILLE & N. R. Co.

v.

WARD'S ADM'R.

(Court of Appeals of Kentucky, Feb. 25, 1898.)

Accident at Street Crossing—Signals—Negligence—Question for Jury.—It is the duty of a railroad company to give proper signals of the approach of its trains when they are approaching a public crossing in a city; and where there is any evidence tending to show that defendant neglected to perform such duty and that such negligence was the cause of the killing of plaintiff's intestate, it is not error to refuse to direct a verdict for defendant.

Same—Elements of Damage.—In an action by an administrator for the killing of his intestate, the true criterion of damages is the ability to earn money which decedent possessed; and it was error to instruct that the jury might consider the value of decedent's power to labor.

Same—Exemplary Damages.*—In such action, where it appears that decedent's death was caused by defendant's gross negligence, exemplary damages may be awarded.

APPEAL by defendant from Jefferson county circuit court. *Reversed and Remanded.*

B. D. Warfield, Lyttleton Cooke, and H. W. Bruce, for appellant.

George Weissinger Smith and O'Neal & Pryor, for appellee.

GUFFY, J. This action was instituted by Patrick Ward, administrator of Mary Ward, against the defendant (now appellant), seeking to recover damages in the sum of \$20,000 for the alleged killing of said Mary Ward by the defendant, its agents and servants. It is substantially alleged in the petition that

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*See note at end of case.

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on the 19th day of June, 1894, the defendant and its servants and agents had under their control, and were operating, a train of cars, propelled by steam, over and along Ninth street, a public street in the city of Louisville, Ky. Plaintiff says that Oak street is a public street in said city, and intersects with Ninth street at a place where said city is thickly inhabited. The defendant, its agents and servants, by their gross negligence in operating and managing said train, and by their gross negligence in running said train at a high and dangerous rate of speed over said Ninth street, and across Oak street, and by their negligence in failing to have at said time a watchman or lookout at the intersection of said streets with said railroad, at which point there is a public crossing, over which, both during the day and night, many persons and vehicles are constantly passing to and fro, all of which was known to the defendant, and by their gross negligence in failing to have at said public crossing electric gongs or other precautions for the protection of persons, and by their gross negligence in failing to have gates at said crossing at the time of said injuries, then and there wrongfully and negligently ran said train against and over plaintiff's intestate, Mary Ward, who was lawfully crossing said Ninth street, over or near said public crossing, whereby, without fault upon her part, she was violently thrown to the ground, and died almost immediately from the effects thereof, all to the damage of decedent's estate in the sum of \$20,000. The answer in substance denies that on the night of June 19, 1894, it or its servants or agents had under their control or were operating a train of cars, propelled by steam, over and along Ninth street, and denies that Ninth street, between Oak street and Kentucky street, is a public street in the city of Louisville, or that Oak street intersects Ninth street in said city. It is also denied that at said time its agents or servants were guilty of gross negligence, or any negligence, in running said train at a high or dangerous rate of speed, or any speed, over Ninth street or any other street, or that by its negligence in failing to have at said time a

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watchman or lookout at the intersection of Oak street or other place at which there is a public crossing, over which during both day and night many persons or vehicles are constantly passing; denies that all of which was known to the defendant. Defendant also denies any negligence on account of failure to use, as a precaution, electric gongs for the protection of persons at the point where Oak street crosses its track or otherwise; denies that said Mary Ward was rightfully or otherwise crossing said Ninth street, or without fault upon her part fell or otherwise was thrown to the ground, or died immediately, or died at all by or through any negligence whatever on the part of defendant, its agents and servants. It also denied that her estate had been damaged by it in any sum. In the second paragraph it is in substance alleged that the said Mary Ward lost her life while trespassing upon defendant's private property, and not at or upon any public street or public crossing; and that she lost her life wholly and entirely by and through her own recklessness, negligence, and carelessness in stepping upon defendant's track immediately in front of its approaching engine, and without taking any heed or precaution whatever for her own safety, notwithstanding the bell on the engine which struck her was ringing at and before the time she was struck; and that, but for her negligence and carelessness, the accident by which she lost her life would not have occurred. The reply is a traverse of all the affirmative averments of the answer. Plaintiff's motion to file an amended petition was overruled on October 15, 1894, and on the 20th of February, 1895, the parties went to trial, which resulted in a verdict and judgment in favor of plaintiff for \$1,800. The appellant afterwards moved for a new trial. The substance of the grounds relied on is as follows: "(1) Because the verdict of the jury is not sustained by sufficient evidence, and is contrary to law. (2) The court erred in giving instructions numbered 1 and 2, prepared and given by the court on its own motion.

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(3) The court erred in giving instruction prepared and offered on behalf of plaintiff in respect to the measure of damages, numbered and designated as '5'. (4) The court erred in overruling the instruction offered on behalf of defendant, which were respectively designated as 'A', 'B', 'C', 'D', 'E', 'F', 'G', 'H', and 'I'. (5) The court erred in overruling defendant's motion made at the close of the evidence on behalf of plaintiff to instruct the jury peremptorily to find for defendant. (6) The court erred in overruling defendant's motion, made at the close of all the evidence, to instruct the jury peremptorily to find for defendant. (7) The court erred in overruling defendant's motion to discharge the jury from further consideration of the case made on the 23d of February, 1895. Appellant's motion for a new trial having been overruled, it prosecutes this appeal.

All the grounds relied on for a new trial were properly overruled, except the third, which is as follows: "Because the court erred in giving instruction prepared and offered on behalf of plaintiff in respect to the measure of damages, and which instruction was numbered and designated as '5'." The instructions asked for by defendant were properly overruled. The decisions cited by appellant have no application to a case like the one at bar. In a city, and in the midst of a populated portion of the city, as is shown to be by the proof in this case, it is the duty of the defendant to use reasonable care to prevent injury to persons upon or crossing the tracks of its road. It was clearly the duty of the appellant to use reasonable care, and to give proper signals of the approach of its trains when approaching a locality like the one in which this accident occurred; and it was the province of the jury to find from the evidence whether or not the defendant used proper care to prevent the accident, and also to what extent, if at all, decedent was guilty of contributory negligence.

Accident at Street
Crossing—Signals
—Negligence—
Question for Jury.

Instruction No. 5 reads as follows: "If the jury shall find for the plaintiff, they should assess his dam-

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ages in such sum as will fairly compensate for the destruction of the life of said Mary Ward, in which they may consider and estimate the value of her power to labor; and, if the jury shall believe from the evidence that the negligence whereby the life of said Mary Ward was destroyed was gross, then the jury shall give, in addition to compensatory damages, as above, such punitive or exemplary damages as they may think proper, under all the facts in the case, the whole award not to exceed the sum of twenty thousand dollars. If the jury shall find for the defendant, they shall say so, and no more." Under the foregoing instruction, the jury were authorized to find damages in such sum as will fairly compensate for the destruction of the life of said decedent, and they are told they may consider and estimate the value of her power of labor. The true criterion of damages is the power of decedent to earn money, and the jury should have been so instructed. We do not think that the criticism of the instruction made by appellant, that it assumed that decedent was killed by the negligence of the defendant, is fully sustained; but it would have been better to have expressed the idea of gross negligence in such manner as to exclude any such criticism. It is a well-settled rule of law in this state that, if decedent was killed by the gross negligence of the defendant, punitive or exemplary damages might be awarded; hence the instruction to that effect was not erroneous.

Same—Elements of Damage. For the error of the instruction indicated, the judgment is reversed, and cause remanded for a new trial, upon principles consistent with this opinion.

Same—Exemplary Damages.

NOTES.

Gross Negligence—Exemplary Damages.—The right to recover exemplary damages is confined to those cases where an injury is inflicted intentionally or where it is prompted by malice or evil purpose, or where it is caused by such wilfulness and recklessness of conduct as betokens an entire indifference to the rights of others. Such is the doctrine laid down in the most recent cases on this subject.

Notes

Hamilton *v.* Third Ave. R. R. Co., 53 N. Y. 25; Belknap *v.* Boston & M. R. R. Co., 49 N. H. 358; Milwaukee & St. Paul R. R. Co. *v.* Armstrong, 91 U. S. 489; Kennedy *v.* North Missouri R. R. Co., 36 Mo. 351; Turner *v.* North Beach & M. R. Co., 34 Cal. 594; Pittsburg Ft. W. & Chicago R. R. Co. *v.* Slusser, 19 Ohio St. 157; Union Pac. R. Co. *v.* Hause, 1 Wyoming, 27; Kansas Pac. R. Co. *v.* Lundin, 3 Col. 94.

It seems indeed at one time to have been considered as law that exemplary damages were recoverable in cases of gross negligence. The modern authorities have, however, gone far to do away with the distinction between gross and ordinary negligence, and, at least, in the case of railroad corporations, exemplary damages can now only be recovered in the instances above named.

See also 21 Am. & Eng. R. Cas. 402 *et seq.*; 30 *Id* 577 *et seq.*

Exemplary Damages in Cases of Gross Negligence.—Some cases, however, hold that exemplary damages may be recovered where the injury is caused by gross negligence on the part of the railroad company. Hopkins *v.* A. & St. L. R., 36 N. H. 9; Taylor *v.* Grand Trunk R. Co., 48 N. H. 304; A. & G. W. R. *v.* Dunn, 19 Ohio St. 162; M. & M. R. *v.* Ashcroft, 48 Ala. 15; L. & N. R. *v.* McCoy, 81 Ky. 403; s. c., 15 Am. & Eng. R. R. Cas. 277; C. St. R. *v.* Steen, 42 Ark. 321; s. c., 19 Am. & Eng. R. R. Cas. 30.

In Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 282, it was held that where the servants of the company were guilty of negligence so grossly culpable as to evince utter recklessness or disregard for the safety of the passengers, the company was liable. See also Alabama G. S. R. Co. *v.* Arnold (Ala.), 30 Am. & Eng. R. Cas. 546; Kentucky C. R. Co. *v.* Dills, 4 Bush (Ky.), 593, Williamson *v.* Western Stage Co., 24 Iowa 171. And where through gross negligence, there was a collision of a passenger and a freight train and the plaintiff was injured, an instruction that it was a proper case for exemplary damages was sustained, the court saying that it was a subject in which all the travelling public were deeply interested; that railroads had practically monopolized the transportation of passengers on all principal lines of travel; that there ought to be no lax administration of law, and that it would be difficult to suggest a case more loudly calling for exemplary damages. Hopkins *v.* Atlantic & St. L. R. Co., 36 N. H. 9.

In Maysville & L. R. Co. *v.* Herrick, 13 Bush (Ky.), 122, it was declared that exemplary damages may be awarded if the evidence shows gross negligence—in other words, the absence of slight care—and that it is not necessary to show the absence of all care, or reckless indifference to the safety of passengers, or intentional misconduct on the part of the agents and officers of the company; and it has been declared that a railroad company impliedly warrants that its engineers, conductors and other employees engaged in running its trains, are possessed of due skill, and competent and faithful, that it is liable under all circumstances for any injury occasioned by the misconduct, rashness or negligence of such person, and that exemplary damages may be recovered therefor. New Orleans, J. & G. N. R. Co. *v.* Allbritton, 38 Miss. 242.

But only in an extreme case will a railroad company be liable in punitive damages for the misconduct of an employee. Fisher *v.* Metropolitan Elevated R. Co., 34 Hun (N. Y.), 433. For injuries caused by the negligence of a servant while engaged in the business of the

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master within the scope of his employment, the latter is liable for compensatory damages, but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages unless he is also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant knowing that he was incompetent or had formed bad habits and was unfitted for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless and of a criminal nature, and clearly established, and corporations may incur this liability as well as private persons. *Cleghorn v. New York C. & H. R. R. Co.*, 56 N. Y. 44. But railroad companies are not liable for punitive damages for the acts of their servants done under circumstances which would give no right to punitive damages as against the servant, had the suit been brought against him instead of the master. *Hamilton v. Third Avenue R. Co.*, 53 N. Y. 25; *Townsend v. New York C. R. Co.*, 56 N. Y. 295. When there is evidence tending to show gross negligence on the part of the defendant, the degree of negligence is for the jury, and an instruction that the plaintiff cannot recover exemplary damages invades its province and is properly refused. *Alabama G. S. R. Co. v. Arnold* (Ala.), 30 Am. & Eng. R. Cas. 546.

The jury may, in their discretion, give exemplary damages where a personal injury has been caused by the gross carelessness of a railroad in the management of their trains. *Hopkins v. Atlantic & St. L. R. Co.*, 36 N. H. 9; *Alabama G. S. R. Co. v. Arnold*, 35 Am. & Eng. R. Cas. 466, 84 Ala. 159, 5 Am. St. Rep. 354, 4 So. Rep. 359; *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466; *Kennedy v. North Missouri R. Co.*, 36 Mo. 351; *Springer Transp. Co. v. Smith*, 16 Lea (Tenn.) 498, 1 S. W. Rep. 280; *International & G. N. R. Co. v. Garcia*, 70 Tex. 207, 7 S. W. Rep. 802; *Peck v. Neil*, 3 McLean (U. S.), 22; *Wall v. Cameron*, 6 Colo. 275.

Or where the evidence shows a grossly careless disregard of the safety of the public, or, what is of equivalent import, recklessness, wantonness, or wilfulness. *Richmond & D. R. Co. v. Vance*, 93 Ala. 144, 9 So. Rep. 574; *Jacob v. Louisville & N. R. Co.*, 10 Bush (Ky.) 263.

Or where there was any aggravating circumstance, such as gross negligence, in the act whereby the injury was inflicted. *Western & A. R. Co. v. Drysdale*, 51 Ga. 644, 7 Am. Ry. Rep. 343.

Or where defendant's negligence is so gross and culpable as to evince utter recklessness. *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

But the negligence should be so gross as to amount to wantonness. *Leavenworth, L. & G. R. Co. v. Rice*, 10 Kan. 426.

Although intentional misconduct is not necessary. *Kansas Pac. R. Co. v. Kessler*, 18 Kan. 523, 15 Am. Ry. Rep. 338.

Exemplary damages can be allowed only where the negligence is of a gross and flagrant character evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects; or where there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness, or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them. As "gross negligence" is not confined to

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this extreme degree of negligence, it is not proper to charge a jury simply that gross negligence will justify the imposition of such damages. *Florida Southern R. Co. v. Hirst*, 52 Am. & Eng. R. Cas. 409, 30 Fla. 1; 11 So. Rep. 506.

In an action to recover damages for personal injuries caused by a failure to keep in proper repair a bridge over a highway, the plaintiff may recover exemplary damages if the negligence was gross. *South & N. Ala. R. Co. v. McLendon*, 63 Ala. 266.

The mere failure to provide a proper platform or light at a stopping place where a branch road turns off, or to give the necessary signals by blowing the whistle or ringing the bell, is not gross negligence allowing an award of exemplary damages; and if the person injured was a mere trespasser or intruder on the track, being at a place where he had no right to be, gross negligence would be the failure to use reasonable care to avoid injury after his peril was discovered. *Ensley R. Co. v. Chewning*, 50 Am. & Eng. R. Cas. 46, 93 Ala. 24, 9 So. Rep. 458.—*Followed in* *Glass v. Memphis & C. R. Co.*, 94 Ala. 581. *Quoted in* *Savannah & W. R. Co. v. Meadors*, 95 Ala. 137.

An action for an injury not resulting in death is a common law proceeding, and punitive damages are recoverable if the proof shows that the company failed to use such diligence in keeping its railroad bridge in repair as careless and inattentive persons usually exercise in the preservation of the same, or of business of like character. *Maysville & L. R. Co. v. Herrick*, 13 Bush (Ky.), 122, 17 Am. Ry. Rep. 53.

The Mississippi statute (Rev. Code, p. 299) for the protection of passengers is intended to hold companies responsible for actual, not punitive or exemplary damages. Gross negligence must be shown to authorize the jury to exceed actual damages sustained. *New Orleans, J. & G. N. R. Co. v. Statham*, 42 Miss. 607.

SOUTHERN RY. CO.

v.

COVENIA.

(*Supreme Court of Georgia, Dec. 17, 1896.*)

Killing of Child—Elements of Damages—Judicial Notice.—Although the declaration stated facts showing the tortious killing of the plaintiff's child by the defendant, and alleged that the child "was a boy well formed, precocious, and of strong and robust physical powers for a child of his age; that he was physically sound in every respect, and was capable of rendering, and did render, to the plaintiff valuable services, by going upon errands to neighbors residing near to plaintiff's residence, picking up and bringing in coal and chips to make and keep burning fires in the house, bringing the broom and other articles used in house cleaning to his

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mother, picking up and carrying out of the house trash and litter which tended to render untidy in appearance plaintiff's home, watching and amusing plaintiff's younger child while his wife was engaged in cooking and attending to her household duties; and that these services were worth to the plaintiff the sum of two dollars per month,"—no cause of action entitling the plaintiff to recover for the child's services was set forth, it being also alleged in the declaration that the child was only 1 year, 8 months, and 10 days old. The allegations of the declaration should be construed all together, and the courts will take judicial cognizance of the fact that an infant of this age is incapable of rendering valuable services.

Same—Measure of Damages—Funeral Expenses.*—In such a case, the father of the child killed is entitled to recover the expenses necessarily and reasonably incurred in the burial of the child, including compensation for the loss of such time on the father's part as was needed for this purpose.

ATKINSON, J., dissenting.

(Syllabus by the Court.)

ERROR by defendant from city court of Brunswick.
Affirmed.

Goodyear & Kay, for plaintiff in error.

Symmes & Bennett and *Johnson & Krauss*, for defendant in error.

SIMMONS, C. J. Whatever may be the rule in other jurisdictions, it is well settled in this state that the gist of an action by a parent to recover damages for the death or injury of a minor child is the loss of services. *Shields v. Yonge*, 15 Ga. 349; *Allen v. Railroad Co.*, 54 Ga. 503. The loss of service being the cause of action, it follows that when the infant is incapable of rendering service at the time of its death or injury the parent cannot recover. This principle was recognized by the counsel of the plaintiff in the court below, for he alleged in the declaration that the child was capable of rendering service, and also specified what acts of service it did render, and the value thereof per month; but in the same declaration it was alleged that the child was but 1 year, 8 months, and 10 days of age. One of the grounds of the demurrer

Case Stated.

*See note at end of case.

was that the plaintiff shows by his allegations in his petition that the child "was of such tender years as to be unable to have any earning capacity, and hence the defendant could not be held liable in damages for the killing of said child, even if negligently done." The question is, therefore, squarely made whether the court, on demurrer, can take judicial cognizance of the fact that a child of this tender age is incapable of rendering such service as would authorize the parent to recover, or whether, in such a case, the court is bound to submit the matter to the jury. In the case of *Minnesota v. Barber*, 136 U. S. 321, 10 Sup. Ct. 862, MR. JUSTICE HARLAN said: "If a fact alleged to exist, upon which the rights of parties depend, is within common experience and knowledge, it is one of which the courts will take judicial notice." In *Ho Ah Kow v. Nunan*, 5 Sawy. 560, Fed. Cas. No. 6,546, MR. JUSTICE FIELD said: "We can not shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench, we are not struck with blindness, and forbidden to know as judges what we see as men." In the case of *King v. Gallun*, 109 U. S. 99, 3 Sup. Ct. 85, it was held that "the court will take judicial notice of matters of common knowledge, and of things in common use." "Courts will take judicial notice of facts generally known as of uniform occurrence, or the invariable action of natural laws." 12 Am. & Eng. Enc. Law, p. 196. The fact that a child of less than 2 years of age cannot perform any services of value to its parent is a matter of common knowledge to all men. It is as well known to the judge as it is to the jury. It being so known to the judge, why should he not act upon it, when he is called upon to do so by proper pleading? Why is he less qualified than the jury to declare a well known fact? Why should he submit such a question to a jury when if they found contrary to this well-known fact he would be compelled to set aside their verdict? Why should he go through the farce of a trial, at the expense of the country in time and money, in order to have a

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Elements of Dam-
ages—Judicial
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jury decide a fact which is already well-known to every one? There is no necessity for a jury trial when there is no issue of fact. In our opinion, there can be no issue of fact as to the ability of a child two years old to perform valuable services. Even if the parent should testify that a child of that age could render services of the value of two dollars per month, it would be so inconsistent with every person's knowledge of the incapacity of children of that age to render service that such testimony would be unworthy of credit. In the case of *Hall v. Hollander*, 10 E. C. L. 746, 4 Barn. & C. 660, BAYLEY, J., in discussing an injury to a child 2½ years old, said: "It is manifest that the child was incapable of performing any service." All courts of any respectability, so far as I know, decide as a matter of law that children of tender years cannot be guilty of contributory negligence. Upon what reason are these decisions made? Upon what theory do the courts hold this as a matter of law? The answer is apparent. Because reason, experience, and common sense teach that a child of that age has not the sense or the capacity to contribute to an injury to itself. It cannot at that age be guilty of any negligence. If the courts can decide this as a matter of law, why can they not decide also, as matter of law, that such a child has no earning capacity? We see no reason why it cannot be done.

But it is contended by the demurrer in the court below that it was admitted that the child was capable of rendering service, and that therefore the court was right in overruling the demurrer. The declaration enumerated certain services of the child, which it alleged were worth two dollars per month. In passing upon a demurrer to a declaration, the court considers all the allegations therein. The demurrer admits all the facts well pleaded. If all the facts taken together, show that the plaintiff is not entitled to recover, the court should sustain the demurrer, although some of the facts alleged would show the measure and amount of the damages. If the major premise in the declaration

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shows no cause of action, the minor premise will not aid in sustaining it. The controlling fact alleged in this declaration was the age of the child, and consequently its incapacity to render service. We have shown that by reason of its tender age it could not perform service for the parent. Conceding, for the sake of the argument, that the fact alleged in the declaration that the child picked up chips, amused the baby, etc., was admitted by the demurrer; there was still no admission that these simple acts were of any value. The allegation in the declaration that they were valuable to the amount of two dollars per month was an opinion or conclusion of the pleader. It was necessarily an opinion or conclusion, because there was no standard by which services of this sort could be valued. We know, as matter of fact, that children of this age are not hired or employed. There can, therefore, be no criterion by which the value of such services could be estimated but that of an opinion. It is well settled that a demurrer does not admit opinions or conclusions of the pleader. If a man, in his action for personal injuries, alleges that he was damaged \$10,000, and there is a demurrer to the declaration, the demurrer does not admit the amount of damages claimed. Moreover, a demurrer does not admit facts which are in their nature improbable or impossible. In the case of *Cole v. Maunder*, 2 Rolle, Abr. 548, one person sued another for damages for throwing at and striking him with a stone. Defendant pleaded that he threw stones at him "*molliter et molli manu*," and that they fell upon him "*molliter*," and it was held not a good justification; the judges saying that one cannot throw stones "*molliter*," although it were confessed by demurrer. Suppose this child had been only six months old, and these allegations as to service and value had been made; it could not be held that a demurrer to the declaration admitted that a child six months old could render service. The allegation would have been improbable and impossible. Suppose a boy five years old were indicted for the crime of rape, all the necessary

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allegations being made ; certainly a demurrer to such an indictment would not admit that the boy did or or could commit the offense charged. Suppose, again, that one female should sue another for the offense of seduction, and the declaration contain all the necessary allegations ; would it be held that a demurrer by the defendant would admit that she did commit the act necessary to constitute the crime? These illustrations are given for the purpose of showing that a demurrer to a declaration cannot be held to admit impossible or improbable allegations of fact, so as to prevent the court from passing upon the allegations which in their nature are contrary to common experience and common knowledge as matter of law, and to compel him to submit them to a jury. We think, therefore, that the court should have sustained the demurrer, in so far as to hold that the parent could not recover damages for the death of the child on account of loss of its services.

2. It is well settled that, although a parent cannot recover damages for the death or injury of his child unless the child was capable of rendering service, he can recover, in an action against the person who inflicted the injury, for his trouble and expense in caring for the child, and, if it dies from the injuries inflicted, he can recover his necessary and reasonable expenses in the burial, including compensation for the loss of such time on the parent's part as was needed for this purpose. See *Dennis v. Clark*, 2 Cush. 347, where this subject is elaborately discussed by METCALF, J. We therefore hold that, while the father in this case cannot recover for the death of his child, he can recover for the expenses he incurred and the loss he sustained rendered necessary by the conduct of the servants of the railroad company ; and on this latter ground we affirm the judgment of the court below. If it is necessary, let this part of the declaration stand, in order to try the amount of expenses necessarily incurred by the father. Judgment affirmed, with direction.

Same—Measure of
Damages—Funeral
Expenses.

St. Louis, I. M. & S. Ry. Co. *v.* Beecher

ATKINSON, J. I dissent from the judgment as rendered. There should be an affirmance without qualification.

NOTE.

Killing of Child — Measure of Damages — Funeral Expenses.—Funeral expenses are part of the damages resulting from the death of a child which may be recovered, see Pa. etc., Co. *v.* Lilly, 4 Am. & Eng. R. Cas. 540, 73 Ind. 252; Raines *v.* St. Louis, etc., R. Co., 5 Am. & Eng. R. Cas. 610, 71 Mo. 164; Little Rock, etc., R. Co. *v.* Barker, 33 Ark. 350; Kennedy *v.* New York, etc., R. Co., 35 Hun (N. Y.) 186; Cleveland, etc., R. Co. *v.* Rowan, 66 Pa. St. 393; Petrie *v.* Columbia, etc., R. Co., 35 Am. & Eng. R. Cas. 430, 29 S. Car. 303; Murphy *v.* New York, etc., R. Co., 8 Am. & Eng. R. Cas. 490, 88 N. Y. 445; but see Dalton *v.* Southeastern R. Co., 4 C. B. N. S. 296; Holland *v.* Brown, 13 Sawyer (U. S.) 284.

ST. LOUIS, I. M. & S. RY. CO.

v.

BEECHER.

(*Supreme Court of Arkansas, Feb. 19, 1898.*)

Death of Person on Track—Due Care in Running Trains.*—The rule requiring a railroad to exercise the highest degree of care in running its trains is not applicable in an action for the killing of a person on its track after such person had ceased to be a passenger; and the error of instructing in such action that the highest degree of care was due from defendant is not cured by a subsequent instruction that deceased was not a passenger when killed, and only reasonable care was due from defendant's employees in charge of the train, it being uncertain which of such instructions influenced the jury to find for plaintiff.

APPEAL by defendant from Lawrence county circuit court. *Reversed and remanded.*

Dodge & Johnson, for appellant.

J. M. Moore, J. K. Gibson, and *W. B. Smith*, for appellee.

BUNN, C. J. This is a suit for \$15,000 damages to the next of kin for the killing of Rebecca Tackwell, plaintiff's intestate. Verdict and judgment for \$1,500, and the defendant railway company appealed.

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*See note at end of case.

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There is evidence to sustain the allegation that the deceased was killed by the negligent running and operation of defendant's train, and there is also evidence of contributory negligence on the part of the deceased which contributed directly to her death. This being true, and there being no question as to the admissibility of testimony offered in evidence, the case turns on the giving and refusing of instructions. The first instruction given by the trial court at the instance of the plaintiff reads as follows, to wit: "You are instructed

Death of Person on Track—Due Care in Running Trains. that the defendant corporation is bound to use, in running and operating its trains on its road, the highest degree of care, diligence, and skill which a prudent and cautious man would exercise, and which is reasonably consistent with its mode of conveyance, and practical operation of its road." This instruction is not hypothetical in form, but seems to be intended as an assertion of an abstract proposition of law; but, even as an abstract proposition, it is erroneous; for, while it is applicable and proper in the case of a passenger, it cannot be made to apply to the case of any other than a passenger, or one sustaining the relation of a passenger to the railway company. It is in close accord with the direction of this court in the case of *Railway Co. v. Sweet*, 60 Ark. 557, 31 S. W. 571, which was a case involving the killing of a passenger. It is not the law that a railway company, in running and operating its trains, is bound to use the highest degree of care, diligence, and skill, generally; for the railroad company owes no such duty to all the world, but only to a class of people,—a very limited class in point of numbers,—passengers on its trains, or those sustaining such relation to it. One of the principal questions in this case is whether or not the deceased, at the time of her death, was a passenger of defendant; and yet the instruction, in effect, was a declaration by the court to the jury that it made no difference whether she was a passenger, a traveler, or trespasser, at the time, in so far as the degree of care, skill, and diligence to be exercised by the defendant was concerned; for it

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made no distinction in favor of passengers, or against travelers and trespassers, in this regard. The evidence showed that deceased, who had been a passenger on defendant's passenger train from Corning to Walnut Ridge depot, had left the train and the depot platform, and was on the railroad track, en route to her residence in the town of Walnut Ridge, when she was run over and killed by the rear coach of said train while the same was being moved backwards. The trial court, holding in effect, that by this act she had ceased to be a passenger, gave the following instruction at the instance of the defendant, to wit: "(7) The relation of passenger to the defendant ceased after Mrs. Tackwell was safely discharged from the train at the place of her destination, and after she left the depot platform. If the evidence shows that the employes on the train that killed Mrs. Tackwell were in the ordinary discharge of their duties, and exercised reasonable diligence and precaution, the defendant is not responsible for unavoidable accident to the deceased, and your verdict will be for the defendant." The fact that deceased had left the depot platform, and was on the railroad track, en route to her home, is undisputed: and she had ceased to be a passenger, under the rule which governs in such cases, and under which the instruction was given. The error of the first instruction is thus made palpable, and, being radically wrong, its defect is not cured by any other instruction given; for, as in all such cases, it cannot be said certainly which of the instructions influenced the jury in making up their verdict. Reversed and remanded for a new trial.

NOTE.

Due Care—Conflicting Instructions.—A judgment in an action for negligence will be reversed where the instructions are conflicting as to the degree of care required of defendant. *Faith v. Tower Grove & L. R. Co.*, 50 Am. & Eng. R. Cas. 426, 105 Mo. 537.

Blaney v. Electric Traction Co

BLANEY

v.

ELECTRIC TRACTION CO.

(Supreme Court of Pennsylvania, Feb. 7, 1898.)

Death on Street Railway Tracks—Contributory Negligence.*— Deceased while attempting to cross a street stopped within about four feet of the nearest street railway tracks to let a car going west pass, and then without stopping crossed those tracks and the space, about four feet in width, between the north and south tracks, and was struck and killed by defendant's car going east. Witnesses testified that he "cut cater-cornered" across the tracks, apparently relying on his speed to take him across before the arrival of the east-bound car. *Held*, that his death was the result of his own negligence.

APPEAL by defendant from Philadelphia county court of common pleas. *Reversed*.

Thaddeus L. Vanderslice and *Thomas Leaming*, for appellant.

A. S. Ashbridge, Jr., for appellee.

DEAN, J. John Blaney, husband of plaintiff, while attempting to cross defendant's tracks at Leamey street crossing of Lehigh avenue, on 21st of September, 1895, was struck by a car and killed. The car tracks are on Lehigh avenue, an unusually broad street. There are double tracks in the centre for cars running east and west, with a space between of six feet. The deceased attempted to cross from the north to the south side of the avenue. Just as he left the curb, a car approached on the north track, the one next him running westward. He stopped about four feet from the track, and, as soon as the car passed, attempted to cross, and was struck by a car running eastward on the south track. There was evidence for the jury such as rapid running at that point, failure to sound the gong and

*See note at end of case.

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inattention of motorman, tending to show negligence of defendant. The plaintiff brought suit for damages. At the trial the learned judge of the court below submitted two questions to the jury: (1) Was defendant negligent? (2) Was deceased negligent? The jury found for plaintiff on both, and defendant appeals, assigning for error the refusal of the court to peremptorily instruct the jury that deceased was guilty of contributory negligence and therefore plaintiff could not recover. The defendant called no witnesses. Consequently the only question is whether plaintiff's evidence disclosed a case of contributory negligence. The deceased was a weaver by trade, and was 54 years of age, in full possession of the senses of sight and hearing, and had been a resident of the city for several years. He must be assumed to have possessed ordinary intelligence, and therefore was bound to know the double tracks were for the passage of cars in opposite directions. He stopped until the west-bound car passed in front of and away from him; then immediately started to cross both tracks, and did not stop before being struck. This was testified to by all of plaintiff's witnesses who saw the accident, five in number. Two of them state that he seemed to cut "cater-cornered" across, as if to avoid the car. One says he ran into the car. But if any fact can be established by unvarying, concurrent testimony, it is that, immediately after the car passed west, he started to cross the intervening 16 feet to the other side of the tracks, and did not stop for an instant. As before noticed, he was bound to know a car might be coming east on the far track. That car could be seen, was actually seen, approaching by the witnesses. He could have stopped for a second on the track of the car which had just left him westward, or for half that time on the six-foot space between the tracks. If he had done either he would have been safe,—that is if the coming car had been running, as is argued by appellee, 30 miles an hour (but this very doubtful); for if he had lost but a second of time on his way to reach the east-bound track, the car would have passed him. To

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bring about the disaster, both had to occupy that particular spot in that particular instant of time. What is the unavoidable inference? Clearly, one of two: Either he did not look for a coming car, where ordinary intelligence and care dictated there might be one; or, seeing one perilously near, he recklessly ran the risk of passing in front of it. The argument of appellee, that the westward car obstructed his view of the east-bound one, is without weight. If he had stopped for a moment on that track to look, the car on the other would have passed him, whether he saw it or not; if he had stopped but a moment on the space between the tracks, he would have seen it coming, and safely passing him. From the testimony of the two witnesses, who say that, without stopping, he "cut cater-cornered" across the tracks, it is not improbable the second inference is correct; that is, he attempted a not unusual experiment, to match his speed against that of the car. Every day on the streets of this city we see agile persons bound from one side of the street to the other, rather than wait a second or two, until an approaching car which they see passes. Probably, 999 get across safely. The one-thousandth one miscalculates his own speed, or that of the car, by half a second, and is injured or killed. But whichever of the two inferences, in the case before us, be correct, each points, unerringly, to contributory negligence. There was no room, on the evidence, for the jury to draw a third one, that of ordinary care on part of deceased; for ordinary care suggested that he stop and look for a coming car running east as well as for one running west. The judgment is reversed, and judgment is entered for defendant.

NOTE.

Crossing before Moving Street-car.—In *O'Connell v. St. Paul City R. Co.*, (Minn.) 4 Am. & Eng. R. Cas., N. S., 60, it was held that plaintiff could not recover for injuries received while attempting to cross in front of a street-car moving twelve miles an hour and only forty feet away.

One who knowingly crosses the track of a street-railway in front

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of moving cars, and so close as to be struck thereby before he could cross, is guilty of contributory negligence, and there can be no recovery even if the motorman was negligent in not stopping the cars. *Watson v. Mound City St. R. Co.*, (Mo.) 3 Am. & Eng. R. Cas., N. S., 385.

Where a pedestrian in the night time suddenly leaves a path on grounds identified as neutral grounds, and is killed in crossing or attempting to cross immediately in front of an electric car which he must have seen had he looked, there can be no recovery for his death. *Haelzel v. Crescent City R. Co.*, (La.) 8 Am. & Eng. R. Cas., N. S., 40.

THOMPSON

v.

SALT LAKE RAPID-TRANSIT CO.

(*Supreme Court of Utah, Feb. 19, 1898.*)

Killing of Deaf Mute on Electric Railway Track—Concurring Negligence.—When both parties are negligent, the true rule is held to be that the party who last has a clear opportunity to avoid the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it.

Same—Proximate Cause.*—A plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was proximately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding the injury to him.

Due Care—Negligence.—A street-car company operating electric cars in a public street which increases the hazards and dangers to pedestrians is held to a degree of care proportionate to the increased danger arising from the use of such propelling power. The greater the danger, the greater the care must be to avoid injury.

Contributory Negligence.—Where deceased was deaf and dumb, but a well-grown boy, of 14 years, possessing average intelligence and good eyesight, *held* that, under such circumstances, he was the more bound to use his eyesight, and that the question of his contributory negligence was properly submitted to the jury.

Negligence—Evidence.—Where it appeared that when the motorman saw the deceased approaching the track, with an evident intention to cross, without seeing the car, the motorman applied the brakes, but they were so defective that they did not work, and he received a shock from the defective motor that delayed his purpose for a second; that he could not stop the car until the injury was done, because of the defective brakes; that the car ran 50 feet after striking the deceased; that the defendant had repeated notice of the defec-

*See note at end of case.

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tive brakes and motor, but failed to repair them; that, if the car had been in repair, it could have been stopped within 8 feet,—*held*, that the defendant was negligent in the use of such car.

Same—Proximate Cause—Defective Appliances.—If the defendant knowingly placed in operation upon the public street a defective car that could not be controlled because the appliances provided for that purpose were out of repair, and the injury complained of was occasioned by such defective brakes and appliances, and the motor-man was unable to avoid the effect of the contributory negligence of the deceased, because of such defects, then it could properly be said that the defendant's negligence was the proximate cause of the injury.

Same—Contributory Negligence.—The defendant should not be allowed to excuse its own want of reasonable care, and avoid liability, by showing that, prior to and at the time of the accident, it had knowingly been negligent in keeping its car and appliances in order and repair, and that on account of such negligence it was unable to prevent the injury complained of at the time by the use of ordinary care.

(Syllabus by the Court.)

APPEAL by defendant from Salt Lake county district court. *Affirmed.*

This action was brought to recover damages for negligently causing the death of the plaintiff's son. The complaint charges that the defendant negligently and carelessly failed to have its cars supplied with suitable brakes, switches, and motors, and that by reason thereof, and of the negligent and careless operation of its car, it was driven on and over the plaintiff's son, a minor child of 15 years, who died from the effects of the injuries received. The testimony on the part of the plaintiff was to the effect that, upon the day in question, the defendant's car was proceeding in an easterly direction along Fourth South street, Salt Lake City, at the rate of 6 or 7 miles an hour; that at this time the plaintiff was engaged in vending in said city, and had stopped his cart on the east side of the street, at a distance of about 40 feet from the railroad track; that the deceased, a deaf and dumb boy, between 14 and 15 years of age was with him, and was sent on an errand across the street, and across the railroad track. The plaintiff, when he sent his son across the street, did not look up and down the track to see if the car was approaching. If he had done so, he would

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have seen the car in question. No obstruction prevented his view of the car. After the boy had started across the street the plaintiff was busy, with his face turned in the opposite direction. The boy had proceeded but a short distance when the plaintiff's attention was attracted by the ringing of the bell on the street car. He looked up, and saw the car approaching, at a distance of about 30 feet from the place where the boy was. At the same time, the boy was about 20 feet from the place of the accident. He said at first he was not alarmed; that he did not think there was any danger; that, if the boy had had his hearing, the ringing of the bell would have attracted his attention, but when the boy had gotten within three or four feet of the track, and the car was then within a short distance, he then for the first time became alarmed. Plaintiff did not see the deceased look up or look in the direction of the approaching car. The motorman rang the bell three or four times, and then, finding it did not attract the attention of the boy, attempted to stop the car, but failed; and the car struck the boy, who died from the effect of the injuries. The car was 40 or 50 feet from the plaintiff at this time, and the boy was passing on north, towards the railroad track, seemingly intent on his errand, and without noticing the car. The car struck the boy as he passed over the north rail. The car passed on about 58 feet beyond where the boy was struck before it was stopped. The boy attended school, and could understand signs in writing. Plaintiff did not consider it as safe for the boy to be out as it would be if he could hear and speak. The boy had no other defect except that he was deaf and dumb. He was a well-grown boy, a little over the average size, and equaled the average of intelligence and quickness of comprehension as compared with children in the full possession of their faculties. He knew of the existence of street cars and lines. The motorman testified that the car was running at a rate of about 6 miles an hour; that he saw the boy coming north when about 20 feet from the track; that he put his foot on the gong, and turned off the power, intending to reverse the car; that,

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when he turned off the power, he had one hand on the brake, and received a shock from the motor that disabled him for a second; that the hind brake of the car was loose, and kicked off; that the brakes on the car were not in good condition; that the car had been disabled in a collision in March before the accident, and after that it could not be controlled by the brakes; that shocks from the brakes were frequent; that, when he turned off the power, he intended to reverse but for the shock he received; the car had been out of repair for a considerable length of time before the accident, and witness had reported it to the proper officer of defendant every time he used it for weeks prior to the accident; that the brakes would not stop the car; that he applied the brakes as soon as he saw the boy was likely to cross the track, and did all he could to warn the boy and stop the car, but could not stop it in time to save him; that the boy did not look up towards the car, but looked straight ahead; that, if the car had been in repair like other cars, he thought he could have stopped it, by reversing, in about 8 feet. Other witnesses testified that the motor was out of repair; that the axles were sprung; that the brakes would not work; and that motormen would frequently be shocked by electricity from the motor. Such reports came from the motormen to the night inspector very frequently before the accident. The defendant offered testimony tending to show that the car and brakes were in good condition at the time of the accident.

Williams, Van Cott & Southerland, for appellant.

Richards & Richards, for respondent.

MINER, J. (After stating the facts). The court submitted the question of the negligence of the defendant, the contributory negligence of the deceased, in connection with his age, capacity, and condition under the circumstances, and the condition of the car, to the jury. The court instructed the jury, among other things, that "even though you believed the son of the plaintiff was guilty of contributory negligence by

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crossing the track without observing whether or not the cars were running thereon and in operation, or by any other act, and that, if he had been free from such contributory negligence, the injury would not have occurred, yet if the motorman, after the act of contributory negligence complained of, had the opportunity, or could, by the use of reasonable care, had the brakes and motor of the car been in proper condition, have avoided the accident, then the act of said motorman, which is the act of defendant company, was the proximate cause of the injury complained of by the plaintiff". "If you believe from the evidence that the defendant company exercised due care and caution in operating the car at the time of the accident, and that the accident was not in any way the result of any defect in the appliances for controlling the car, then the defendant would not be liable." Exceptions were taken to these instructions. Appellant's counsel contend that conceding the fact that the defendant, was negligent in sending out a defective car, and that the deceased was also negligent in crossing the track in front of the car, in such a case it was the only duty of the defendant, after discovering the dangerous situation of the deceased, caused by his own negligence, to exercise all reasonable care and diligence at his command at the time of the injury, and that when the motorman did all he could to stop the car, although its brakes were defective, the defendant could not be held liable, even if the car had been sent out in a defective condition with the defendant's knowledge; that, as nothing could be done by the motorman after the discovery of the boy's negligence to remedy the defective condition of the car, all that he was required to do was to use the defective appliances which he had to stop the car; that, if the deceased was guilty of contributory negligence, the unsafe and defective condition of the car, although known to the defendant, was not the proximate cause of the injury. The result of such a doctrine would be that under such circumstances, when the defendant discovered negligence in plaintiff,

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he could legally excuse the exercise of his own want of reasonable care, by showing that its appliances and brakes were in such a wretched condition at the time, on account of its previous and continued negligence, that it was incapacitated from preventing the injury complained of at the time by the use of reasonable care. The position of the able counsel for the defendant is not only ingenious, but is apparently supported by some authority bearing upon the general question of contributory negligence; but we cannot subscribe to

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gence.

such a doctrine when applied to the operation and management of electric cars upon the streets in a city where the lives and safety of pedestrians are largely dependent upon the safe equipment and perfect condition of the appliances with which a street car is propelled, operated and controlled. If such a doctrine should be established, it would practically place the exclusive right to the use of the street occupied by the street-car company in such company, to the exclusion of the citizen. If the citizen used the street, he would do so at the peril of his own safety. If such rules were applicable to contributory negligence, his safety in crossing a street where street cars were operated, with his right to recover damages in case of negligence, would largely depend upon the option of the company to keep its appliances in good repair. In case of his injury by its negligence, the fact of such negligence on the part of the company would be a bar to his recovery in case he contributed to the accident, which the company could, by the use of reasonable care have avoided.

Persons travelling upon a public street, and crossing street-car tracks, are not held to the same degree of care as when crossing a steam-railroad track. This is so because in the one case the street car can or should be in such a condition as to be brought readily under control, and because the public have a right to travel upon all of the public streets, while such rights do not usually exist with reference to steam railroad tracks. When the streets were originally platted, they were

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not designed for street railways, but were confined to the right of public travel, with equal rights to all persons travelling thereon. The right conferred upon a street railway is not superior to that of the public at large, except the right to lay its tracks and operate its cars, which must be done with as little inconvenience as possible to the public travel. The right conferred includes no exclusive right to use the track or street. Neither has the citizen the exclusive right to the use of the track or street. The cars have the right of way in case of meeting vehicles or persons on the track, but each party is bound to exercise such ordinary care, prudence, and precaution to avoid injury as the surrounding circumstances may require. That which might be ordinary care in running horse cars might be gross negligence in operating street cars propelled by electricity or running at a high rate of speed. The electric car is propelled by a force that cannot be easily controlled except by such appliances as are expressly provided for that purpose. Without these appliances to control it, it becomes dangerous. Neglect to provide these safe guards for its control and management is negligence. "The duty of the company to recognize the rights of persons in the lawful use of the streets is imperative, and, if it adopts a propelling power which increases the hazards of such persons, it must be held to a degree of care proportionate to the increase of danger because of such propelling power. This is so because, the more dangerous the appliance, the more likely it is for casualties to happen; and, consequently, the greater the degree of care which must necessarily be exercised in order to avoid their occurrence". When the defendant placed its cars upon the track for service, the deceased had a right to expect that the usual appliances required for starting, stopping, and controlling the car were provided. Knowingly placing an electric car upon a track in a public street, and allowing it to run without such appliances for its control, is not only gross negligence, but it may amount to criminal negligence in case of injury to one without his fault.

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In the case at bar, the motorman saw the deceased when he was about 20 feet from the track. He rang the bell, and as the deceased approached the track, with the evident intention of crossing without looking up or seeing the car, he applied the brakes, and intended to reverse the car; but the handle of the brake was so out of repair that he received an electric shock from the motor that disabled him for a second and delayed his purpose. The brakes were out of repair, and would not work, and he could not stop the car with the appliances furnished until the injury was done; and, with all his efforts to stop the car it ran about 50 feet after it struck the boy before he could stop it. Notice of the defective condition of the car had been given the defendant company many times prior to the injury, but the defect had not been remedied. The testimony shows that, had the car been in repair like other cars, the motorman could have stopped it by reversing it in about 8 feet. These facts undoubtedly present a clear case of negligence on the part of the defendant company. If the motorman had not received the shock from the motor, he could have reversed and stopped the car. If the brakes had been in order, he might have stopped the car, and prevented the injury.

Negligence—
Evidence.

The testimony also shows that the deceased was deaf and dumb, but a well-grown boy, a little over 14 years of age, and possessed of at least average intelligence and quickness of comprehension. He was acquainted with street cars. His eyesight was good. He was of sufficient age and intelligence to understand the dangers that surrounded him in that locality, and, on account of the defect he was laboring under, was more bound to use the sight he possessed for his own safety. The question of his contributory negligence was properly submitted to the jury. 2 Shear. & R. Neg. § 481. Both parties being negligent, the true rule is held to be that "the party who last has a clear opportunity to avoid the accident, notwithstanding the negligence of his oppo-

Contributory Neg-
ligence.

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ment, is considered solely responsible for it". 1 Shear. & R. Neg. § 99. It is also well settled that a plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was proximately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding the injury to him. 1 Shear. & R. Neg. § 99. Under such circumstances, the obligation rested upon the defendant to exercise reasonable care to avoid the consequences of the deceased's negligence; and the question as to whose negligence was the direct and proximate cause of the accident was one of fact for the jury to determine, under all the facts and circumstances of the case. The question was properly submitted for their determination, and they found against the defendant. Under the circumstances shown, it was clearly the duty of the defendant to have had the car supplied with sufficient brakes, motors, and appliances, with which it could be controlled. The motorman should have been furnished with sufficient means and suitable appliances with which to slow down and stop the car immediately on the first appearance of danger. Allowing the appliances adopted and in use for the purpose of controlling the car to become out of repair and useless for that purpose, and the inability of the motorman to stop the car for that reason, were doubtless, as the jury found, the proximate cause of the accident. The defendant should not be allowed to excuse its own negligence and want of reasonable care in such cases, and avoid liability, by showing that prior to and at the time of the accident he had knowingly been negligent in keeping his car and appliances in order and repair, and that on account of such negligence he was unable to prevent the injury complained of at the time by the use of ordinary care. If the defendant knowingly placed in operation upon the public street a defective car, that could not be controlled because the

Same—Proximate Cause—Defective Appliances.

Same—Contributory Negligence.

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appliances provided for that purpose were out of repair, and the injury complained of was occasioned by such defective brakes and appliances, and the motorman was unable to avoid the effect of the contributory negligence of the deceased, because of such defects, then it would properly be said that the defendant's negligence was the proximate cause of the injury. In the case of *Penny v. Railway Co.* (Sup.) 40 N. Y. Supp. 172, it appears that a box of sand was usually provided for use upon the car, but was not provided for use at the time of the accident. The court held the following instruction proper: "If the jury find that, by using the sand at the time this accident happened, the car might have been stopped in a shorter space than it was, it was a question for them to say whether it was not negligence on the part of the defendant that there was no sand on the car to use." We are of the opinion that the court committed no error in its instructions to the jury. *Hall v. Railway Co.*, 13 Utah, 243, 44 Pac. 1046; *Penny v. Railway Co.* (Sup.) 40 N. Y. Supp. 172; 1 *Shear. & R. Neg.* §§ 481-483; 2 *Shear. & R. Neg.* §§ 481-483; *Booth, St. Ry. Law*, § 305; *Dederichs v. Railway Co.*, 13 Utah, 34, 44 Pac. 649. We are also satisfied that there was evidence to support the verdict. We find no reversible error in the record. The judgment of the district court is affirmed.

ZANE, C. J., and BARTCH, J., concur.

NOTE.

Concurring Negligence—Proximate Cause.—See 22 Am. & Eng. R. Cas. a. 537 *et seq*; and 19 Am. & Eng. R. Cas. a. 36.

The rule that the negligence of the injured party which proximately contributes to the injury precludes him from recovering has no application where the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former party is exposed, to use a proper degree of care to avoid injuring him. *Cincinnati, H. & D. R. Co. v. Kassen*, 52 Am. & Eng. R. Cas. 427, 49 Ohio St. 230, 16 L. R. A. 674, 31 N. E. Rep. 282. When, in an action to recover damages for personal injuries, the defense of contributory negligence is relied on, the defendant is liable, although the plaintiff's negligence essentially co-operated

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to produce the injury, when it could have been averted by the exercise of reasonable care and ordinary prudence on the part of the defendant or his servants after discovering, or after the time when they ought to have discovered, the danger in which the party injured stood. *Cook v. Central R. & B. Co.*, 67 Ala. 533; *Gothard v. Alabama G. S. R. Co.*, 67 Ala. 114; *Little Rock & Ft. S. R. Co. v. Cavenesse*, 48 Ark. 106, 2 S. W. Rep. 505; *Denver & B. P. R. T. Co. v. Dwyer*, 3 Colo. App. 408; *Johnson v. Baltimore & P. R. Co.*, 6 Mackey (D. C.) 232; *Holohan v. Washington & G. R. Co.*, 8 Mackey (D. C.) 316; *Chicago W. D. R. Co. v. Ryan*, 43 Am. & Eng. R. Cas. 396, 131 Ill. 474, 23 N. E. Rep. 385; *Lewis v. Baltimore & O. R. Co.*, 38 Md. 588, 10 Am. Ry. Rep. 521; *Baltimore & O. R. Co. v. Mulligan*, 45 Md. 486; *Karle v. Kansas City, St. J. & C. B. R. Co.*, 55 Mo. 476; *Swigert v. Hannibal & St. J. R. Co.*, 9 Am. & Eng. R. Cas. 322, 75 Mo. 475; *Price v. St. Louis, K. C. & N. R. Co.*, 3 Am. & Eng. R. Cas. 365, 72 Mo. 414; *Dunckman v. Wabash, St. L. & P. R. Co.*, 95 Mo. 232, 10 West. Rep. 396, 4 S. W. Rep. 670; *Kellny v. Missouri Pac. R. Co.*, 43 Am. & Eng. R. Cas. 186, 101 Mo. 67, 13 S. W. Rep. 806; *Warming-ton v. Atchison, T. & S. F. R. Co.*, 46 Mo. App. 159. (By SMITH, P. J., but ELLISON and GILL, J J., dissenting.) *White v. Wabash Western R. Co.*, 34 Mo. App. 57; *Keim v. Union R. & T. Co.*, 15 Mo. App. 593; *Cadmus v. St. Louis B. & T. Co.*, 15 Mo. App. 86; *Neier v. Missouri Pac. R. Co.*, 12 Mo. App. 25; *Neier v. Missouri Pac. R. Co.*, 12 Mo. App. 35; *Kempinger v. St. Louis & I. M. R. Co.*, 3 Mo. App. 581; *Union Pac. R. Co. v. Mertes*, 35 Neb. 204, 52 N. W. Rep. 1099; *Green v. Erie R. Co.*, 11 Hun (N. Y.) 333; *Sweeney v. New York Steam Co.*, 25 N. Y. S. R. 598, 6 N. Y. Supp. 528; *Gunter v. Wicker*, 85 N. Car. 310; *Turrentine v. Richmond & D. R. Co.*, 23 Am. & Eng. R. Cas. 460, 92 N. Car. 638; *Manly v. Wilmington & W. R. Co.*, 74 N. Car. 655, 13 Am. Ry. Rep. 105; *Troy v. Cape Fear & Y. V. R. Co.*, 34 Am. & Eng. R. Cas. 13, 99 N. Car. 298, 6 S. E. Rep. 77, 6 Am. St. Rep. 521; *Cincinnati, H. & D. R. Co. v. Kassen*, 52 Am. & Eng. R. Cas. 427, 49 Ohio St. 230, 31 N. E. Rep. 282, 16 L. R. A. 674; *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172; *Hays v. Gainesville St. R. Co.*, 34 Am. & Eng. R. Cas. 97, 70 Tex. 602; 8 S. W. Rep. 491; *Trow v. Vermont C. R. Co.*, 24 Vt. 487; *Virginia Midland R. Co. v. White*, 34 Am. & Eng. R. Cas. 22, 84 Va. 498, 5 S. E. Rep. 573; *Clark v. Richmond & D. R. Co.*, 18 Am. & Eng. R. Cas. 78, 78 Va. 709, 49 Am. Rep. 394; *Richmond & D. R. Co. v. Anderson*, 31 Gratt. (Va.) 812; *Downey v. Chesapeake & O. R. Co.*, 28 W. Va. 732; *Radley v. London & N. W. R. Co.*, L. R. 1 App. Cas. 754, 46 L. J. Ex. D. 573, 35 L. T. 637, 25 W. R. 147.

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PARISH

v.

WESTERN & A. R. Co.

(Supreme Court of Georgia, May 21, 1897.)

Killing of Person Sleeping on Track*—Nonsuit.—Even if the evidence in the case was sufficient to find that the homicide of plaintiff's daughter was caused by being stricken by some part of a locomotive or car attached to a moving train, it also shows the further facts that the person injured was on the track, and in some other than an erect position, either sitting or lying thereon, and that such injury occurred at night, between 12 o'clock and daylight. These facts being true, it is a conclusion of law that the injured person could at least have avoided the injury by the exercise of ordinary care, and there could be no recovery. The nonsuit was therefore right, and the judgment of the court below is affirmed.

Same—Dissenting Opinion.*—There was evidence from which the jury could have inferred that the person for whose homicide this action was brought was killed by the running of the train of the defendant company, and upon that evidence the presumption of negligence arose against the company. Consequently, the company might have been held liable, and, there being no evidence as to the circumstances attendant upon the commission of the homicide which either rebuts that presumption or shows that the person injured did not exercise ordinary care, the granting of a nonsuit was erroneous. *Per* LUMPKIN, P. J., and ATKINSON, J.

(Syllabus by the Court.)

ERROR by plaintiff from Catoosa county superior court. *Affirmed.*

B. Z. Herndon, T. R. Jones, and W. E. Mann, for plaintiff in error.

Payne & Tye and R. J. & J. McCamy, for defendant in error.

SIMMONS, C. J. There was no evidence tending to show that the plaintiff's daughter was killed by the railroad, except the fact that she was found lying dead near the track, her body bearing certain marks of violence, described below. Her body was found at a point not near a public crossing.

Case Stated.

*See note at end of case.

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There was a hole in the left side of her head, behind the ear, where her skull was crushed to such an extent that an egg would lie in the cavity. At about 3 o'clock in the morning of the 12th of December the railroad train passed the point where she, about daylight of the same morning, was found. Taking into consideration the time of the year, the finding of her body must, therefore, have taken place at about 6 o'clock of the morning. One witness said that, when he first saw her, blood was running from the wound. The physician who examined her after her death testified that blood would cease running 10 or 15 minutes after the death of a person who died from such a wound; that in his opinion a person who had received such a wound might live 15 minutes or even a half an hour. There was no blood upon the track of the railroad, there was no indication that the deceased had been dragged by the engine or cars, and her clothing was not torn. She was lying at right angles to the track, her feet near the rail. On the left side of her head was the indentation referred to above, and on the right side were a few little gashes. Several witnesses testified as to how the accident might have happened, but it was seen by no one. One witness said that the deceased might have been struck by the steps of the locomotive; another, that she might have been struck by the elliptic springs that project from the trucks. These however, are mere conjectures. To me it seems unreasonable to suppose that if a woman had been struck by the train at three o'clock, and her head crushed as the physician testified it was, she could have lived for nearly three hours. She must have lived that length of time after the accident, if she was killed by the train; for one of the witnesses testified that when he found her, at daylight, blood was running from the wound in her head, and, according to the testimony of the doctor, to the effect that in such cases blood ceases to flow in 10 or 15 minutes, she must have been alive less than 15 minutes before the first witness saw her.

Whether this view of the case is correct, or not, the

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majority of the court think immaterial, since, in their opinion, the plaintiff will in neither event be entitled to recover. If the deceased was killed by the train, the testimony shows that she could not have been on the track in a standing or walking position; for she would then have been badly mutilated. So, if she had been directly on the track in any position. The nature of the wounds was such that they could have been inflicted by only certain parts of the engine or cars, and these portions were so located as not to strike her head, had she been standing or walking either on or near the track. She must, therefore, have been on the ends of the cross-ties or near the track,—so near that the steps or elliptic springs could have struck her head,—and she must have been sitting or lying down. The watchman testifies that at midnight he passed with a lantern the spot where she was subsequently found, and that at the time he passed she was not there. If she was struck at all by the train, she must have sat or lain near the track after the watchman passed, and was doubtless asleep when the train passed. Standing, she could not have received the wound in her head, and no other wound on any portion of her body, if the wounds were made by a train. If this theory be correct she was guilty of the grossest negligence in sitting near the track of a railroad and going to sleep in the night-time. The evidence shows that the train which, at 3 o'clock, passed the place where she was found, was moving at a speed of from 35 to 40 miles an hour. It would have been impossible for the engineer to have stopped the train in time to avoid striking her in the distance she could be seen by the headlight.

Section 2322 of the Civil Code declares: "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence." Section 3830 is: "If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover." For a person to sit or lie down upon or near the track

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of a railroad at night and to go to sleep there is gross negligence. He knows that trains are constantly passing. The railroad track is itself a warning of danger to every one who goes upon it; and whoever does so, especially in the night-time, takes his life in his own hands.

In the case of *Sims v. Railroad Co.*, 28 Ga. 93, the report of the case shows that Sim's slave, in the day-time, was sitting on the end of a cross-tie, and was struck by the engine, and killed. He could have been seen by the engineer at a distance of several hundred yards. The whistle was not blown until the cars came within about 20 steps of him. He gave no heed to the notice (the presumption is he was asleep), and was struck and killed, as above stated. He could have seen the train about 1,000 yards up the road. Sims sued the railroad company for the value of the slave, and on motion a nonsuit was granted. BENNING, J., in delivering the opinion of the court, says: "Was the court below right in granting a nonsuit? We think so. The case, on the part of the suffering party, Sims, was a case of the grossest negligence. There is not a single thing to serve as an excuse for his negro's being on the railroad track of the company, and that track was a place of notorious danger. To go to sleep in such a place could be nothing short of an act of the grossest negligence."

The case of *Raden v. Railroad Co.*, 78 Ga. 47, was one where "two boys, seventeen years of age, started from the house of their employer at night to go to the homes of their mothers for the night. Fifteen or twenty minutes after they left, the service train on the railroad went by. They had had plenty of time to have crossed the railroad and reached home. They were struck by the train at a public crossing. One of them was killed, and the other seriously injured. The witness by whom the plaintiffs sought to establish their right to recover testified that the boy who died had told him that they had stopped at the crossing, and the witness was satisfied that they were asleep. * * * Held,

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that a nonsuit was properly granted. To go to sleep on a railroad crossing was such negligence and recklessness as would prevent a recovery, even though the railroad company might have been negligent." BLANDFORD, J., in delivering the opinion of the court, says: "Even if the railroad company had been negligent, yet if the person injured could have avoided the consequences thereof to himself by ordinary care, he cannot recover [citing the Code section above]. So it appears to us that ordinary care would have induced any one not to go to sleep on a crossing of a railroad, and the mere going to sleep on the railroad crossing was great negligence and recklessness on the part of these boys. The testimony submitted by the plaintiffs showed that these injuries were caused by their own negligence and the want of ordinary care to avoid the same." This was held, although the boys were, when struck, on a public crossing.

In the case of Railroad Co. v. Smith, 78 Ga. 694, 3 S. E. 397, it appears that Smith, shortly before day, while it was yet dark, got on the railroad track at a crossing, turned down the track, using it as a walk, and going only about 65 or 70 yards, when the train, running at high speed, struck him, threw him off of the track, crushed his leg, and injured him seriously. BLECKLEY, C. J., in discussing Smith's right to recover, said: "It would be flagrantly unreasonable and improbable to presume that he or any one else had the shadow of a right to use the track, especially at such an hour, on any other condition. The train was on its regular schedule time. He quietly walked along upon the track as if it belonged to him. The train struck him, knocked him down and broke his leg; those on the engine not seeing him or being aware of his presence. It was at least as much his business to look for the engine as it was the engineer's business to look for him. The engine was a much larger object than he was. It carried a headlight, and could have been seen as far as he could. It was not possible for the engineer to have discovered him on the track sooner than he could have

seen the headlight. The presence of the engine was more to be expected by him than his presence was to be expected by the engineer. He had much less reason to be surprised than the engineer had. As a matter of fact, to walk along the middle of a railroad track, between crossings, when it is dark, and without knowing and remembering whether a train is due or not, and without looking out in both directions for trains that may be due, and without listening attentively and anxiously for the roar and rattle of machinery, as well as for the sound of bell or whistle, is gross negligence." In the further discussion of the case (page 700, 78 Ga., and page 399, 3 S. E.) it is said: "A person, while grossly negligent himself, has no legal right to count on due diligence by others, but is bound to anticipate that others, like he has done, may fail in diligence, and must guard not only against negligence on their part, which he might discover in time to avoid the consequences, but also against the ordinary danger of there being negligence which he might not discover until too late. Smith shows, by his own testimony, that he did not discover his danger. If he had been on the crossing, or at any place he was by right entitled to be, he would have been warranted in assuming that the whole world would be diligent in respect to him and his safety; but, as he was engaged in an act of gross negligence himself, he ought to have anticipated that somebody else might fail in diligence, and that the consequences might come down upon him before he discovered the negligence." The trial judge had refused a new trial, and this judgment was reversed, although the injury had occurred in an incorporated town. Subsequently, when the case was again tried in the superior court, and substantially the same evidence was introduced, the trial judge granted a nonsuit, which was affirmed by this court. *Smith v. Railroad Co.*, 82 Ga. 801, 10 S. E. 11.

In the case of *Railroad Co. v. Hankerson*, 61 Ga. 114, it was held that, "if one voluntarily becomes drunk, and consequently falls down, or lies down, in a state of insensibility, on a railroad track, so that he is injured

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by a passing train, he cannot recover for injuries so received, even though there may have been contributory negligence on the part of the employees of the road."

In the case of *Wilds v. Railroad Co.*, 82 Ga. 667, 9 S. E. 595, it was held that "one knowingly and needlessly walking at night upon a railroad track can, by the use of ordinary diligence, avoid being run over by a train unless it appears that, owing to some special fact or circumstance, the use of such diligence would prove ineffectual." BLECKLEY, C. J., in discussing the case, said: "The homicide occurred at night, several hundred yards from any public crossing; and the only reason why there was any such unfortunate calamity was that the company and the deceased were both attempting to use the track at the same time. The company had a right to its use; the deceased had none. There is no explanation whatever as to why he did not avoid the consequences of the company's negligence. That he could have done so by exercising the care of a prudent person is manifest. * * * From the facts set out in the official report, it will be seen that this killing cannot be accounted for except upon the theory that the plaintiff's husband was grossly negligent. Had he been in the use of ordinary care, it seems impossible that he could have been in the way of the train at such an hour and in such a place."

We think that the principles announced in the above-cited cases by this court should control the disposition of this case. The facts here are as strong or stronger in favor of the nonsuit than the facts in the cases cited. Here was a young woman, wandering about in the dead hours of the night. She seated herself on the ends of the cross-ties, or near the track of the defendant's road. There was no public crossing near where she stopped. Presumably she fell asleep. The defendant's train passed along on its schedule time, and it is claimed that the deceased was killed thereby. The only theories under which the homicide can be charged to the passing train make the deceased woman's conduct necessarily

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such as to constitute, under the decisions cited *supra*, negligence so gross that her mother cannot recover, even if the railroad was somewhat in fault. It is argued, however, that she may have been taken suddenly ill, and been compelled to stop where she did, and that therefore the railroad ought to be put upon its explanation. If such were the circumstances, how could the servants and agents of the railroad company have known anything about her sudden illness? It was in the night and they had no reason to believe or suspect that she would be upon the track at that place. Had it been at a public crossing, then the law requires them to look specially to see if any person or thing is on the crossing. Besides, in the case of *Wilds v. Railroad Co.*, *supra*, both in the syllabus and in the opinion, it is strongly intimated that this fact of sudden illness must be made to appear by the plaintiff, and not the defendant; and in such a case we think the burden would be upon the plaintiff to show the sudden attack of illness, in order to rebut the presumption of want of ordinary care raised by the circumstances attending the homicide.

It is also contended that the Cases of *Hankerson* and *Wilds* were so decided because it appeared that they were drunk at the time they were injured. *Wilds'* Case was not put upon that ground at all, nor do we see that it matters in principle whether gross negligence is committed by one who is sober or by one who is drunk. If there could be any extenuation at all, it would seem that it should be in favor of the drunken man. The sober man who is guilty of gross negligence in walking upon the track in the night-time, or in sitting upon the track, or lying upon it asleep, does so while in possession of all of his faculties. With the drunken man it is different, and his negligence arises, not so much from what he does while intoxicated, as from his act in placing himself in that condition.

It is also contended that, under our Code, when it is shown that a person is killed or injured by a railroad train, the law presumes that the company was negligent. This is true, and ordinarily it is incumbent upon the

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railroad company to show that it exercised all reasonable care at the time of the accident; but where the plaintiff's own evidence shows that he was guilty of gross negligence, the presumption against the company is rebutted or overcome, and the plaintiff cannot recover, even though the company may have been at fault. We think, for these reasons, and under the principles of the cases above cited, that the court did not err in granting a nonsuit in this case. Judgment affirmed.

LUMPKIN, P. J., and ATKINSON, J. (dissenting.) Our objection to the disposition which the trial judge, with the approval of a majority of this court, has made of this case, is that we believe it amounts to a usurpation of a function which properly belongs to a jury.

Same—Dissenting
Opinion. The evidence does not affirmatively show in what manner the death of the plaintiff's daughter was occasioned. It is a thing which has to be reasoned out from the established facts; and this, under our system, is peculiarly an appropriate task for a jury. The testimony would support a number of different theories. That adopted by the court and discussed in the foregoing opinion is certainly a plausible one; but we cannot undertake to say that, as matter of law, it is correct. The argument in support of it is strongly put by the Chief Justice. Such an argument, if addressed to a jury, ought to have great, if not convincing, weight. At the same time, they would not be obliged to accept and follow it. A very strong argument could be made upon the evidence in this record in support of a contention that the deceased was not killed by a train of the defendant. It is not, however, insisted that a finding that she was so killed would have been unwarranted. The truth is, none of us know, or can ever know, exactly how she came to her death. We do not wish to be understood as entertaining the view that the plaintiff ought necessarily to have had a verdict. Our position simply is that whether she was entitled to recover was a question for a jury. Upon the assumption that the deceased was killed by a passing train of the defend-

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ant, the plaintiff had in her favor a legal presumption that the company was negligent, and therefore liable. This presumption was not, in our opinion, rebutted; nor are we able to agree with our brethren in saying that the evidence conclusively shows the deceased to have been wanting in ordinary care. None of the cases cited are authoritative or controlling in the case at bar. Each depends upon its own peculiar facts, and no one of them is precisely like the case in hand. It is not our purpose to discuss the evidence. We simply desire to present in this brief form our reasons for being unable to concur in the judgment of this court affirming that of the trial court in granting a nonsuit.

NOTES.

Death by Wrongful Act—Burden of Proof.—In suits for personal injuries, caused by negligence, plaintiff must allege and prove that he was at the time in the exercise of due care; and where the action is for causing death the burden is upon the administrator suing to show that the deceased exercised ordinary care to avoid the injury. *Illinois C. R. Co. v. Nowicki*, 148 Ill. 29, 35 N. E. Rep. 358; *Indiana, B. & W. R. Co. v. Greene*, 25 Am. & Eng. R. Cas. 322, 106 Ind. 279, 55 Am. Rep. 736, 6 N. E. Rep. 603; *Patterson v. Burlington & M. R. Co.*, 38 Iowa 279; *Curran v. Warren C. & M. Co.*, 36 N. Y. 153, 34 How. Pr. 250; *Schappert v. Ringler*, 13 J. & S. (N. Y.) 345; *Krauss v. Wallkill Valley R. Co.*, 23 N. Y. Supp. 432, 52 N. Y. S. R. 838, 69 Hun 482; *Sutherland v. Troy & B. R. Co.*, 74 Hun 162, 26 N. Y. Supp. 237, 56 N. Y. S. R. 397.

That is, the facts and circumstances proved must show that he was in the exercise of such care. *Chicago & A. R. Co. v. Adler*, 39 Am. & Eng. R. Cas. 666, 129 Ill. 335, 21 N. E. Rep. 846; *affirming* 28 Ill. App. 102.

It is not enough to prove facts from which either the conclusion of negligence or the absence of negligence may be with equal fairness drawn, but the burden is upon plaintiff to satisfy the jury that there was no contributory negligence on the part of deceased. *Hart v. Hudson River Bridge Co.*, 84 N. Y. 56; *Shea v. Boston & M. R. Co.*, 154 Mass. 31, 27 N. E. Rep. 672.

The burden is on the plaintiff to show defendant's negligence, or that the deceased was without fault. *Prather v. Richmond & D. R. Co.*, 80 Ga. 427, 9 S. E. Rep. 530.

Negligence will not be presumed from the mere fact of accident, which is as consistent with the presumption that it was unavoidable as it is with negligence, and there should be some evidence that it could have been avoided with proper diligence and precaution. *Stern v. Michigan C. R. Co.*, 76 Mich. 591, 43 N. W. Rep. 587; *Werbowsky v. Ft. Wayne & E. R. Co.*, 86 Mich. 236, 48 N. W. Rep. 1097;

Notes

Toomey *v.* Eureka I. & S. Works, 89 Mich. 249, 50 N. W. Rep. 850; Yarnell *v.* Kansas City, Ft. S. & M. R. Co., 113 Mo. 570, 21 S. W. Rep. 1; Bahr *v.* Lombard, 53 N. J. L. 233, 21 Atl. Rep. 190, 23 Atl. Rep. 167; Barrett *v.* Smith, 27 J. & S. 250, 14 N. Y. Supp. 307, 38 N. Y. S. R. 526; *reversed in* 128 N. Y. 607, 28 N. E. Rep. 23; see also 135 N. Y. 659, 32 N. E. Rep. 648.

Same—Presumption that Deceased Exercised Due Care.—The law, out of regard to the instinct of self-preservation, presumes that a person who has suffered death by a railroad accident was at the time of the accident in the exercise of due care, and this presumption is not overthrown by the mere fact of the injury. Flynn *v.* Kansas City, St. J. & C. B. R. Co., 18 Am. & Eng. R. Cas. 23, 78 Mo. 195; Cleveland & P. R. Co. *v.* Rowan, 66 Pa. St. 393; Parsons *v.* Missouri Pac. R. Co., 94 Mo. 286, 6 S. W. Rep. 464, 12 West. Rep. 615.

Where there is no eye-witness to the accident it will be presumed, in the absence of any evidence to the contrary, that the deceased used ordinary care and caution, which presumption is sufficient to permit the plaintiff to recover upon showing negligence on the part of the defendant. Adams *v.* Iron Cliffs Co., 41 Am. & Eng. R. Cas. 414, 78 Mich. 271, 44 N. W. Rep. 270.

In an action by a widow against a railroad company for causing the death of her husband by a locomotive, as he was crossing their track on a street in a carriage, she made out a *prima-facie* case of negligence, without proving affirmatively that he had "stopped, and looked, and listened." *Held*, that the presumption in law was that he had stopped, looked, and listened, and the burden of proving contributory negligence was on defendants. Weiss *v.* Pennsylvania R. Co., 79 Pa. St. 387.—*Following* Pennsylvania R. Co. *v.* Weber, 76 Pa. St. 157.

In such case a witness for the defendants testified that the deceased could have seen the train coming if he had looked. *Held*, that this did not justify the court in instructing the jury to find for defendants. Weiss *v.* Pennsylvania R. Co., 79 Pa. St. 387.

Same—Burden on Defendant to Show Absence of Negligence.—When a person is killed by the running of a train, the presumption that the death was caused by the negligence of the company arises, and the burden of rebutting it rests upon the company. East Tenn., V. & G. R. Co. *v.* Hartley, 73 Ga. 5; McLean *v.* Burbank, 11 Minn. 277 (Gil. 189).

Tenn. Code, § 1169, affirms the common law principle that the killing of a person being proved the burden is on the company to show that it was guilty of no negligence, that the accident was unavoidable, and also expressly puts the burden on the company of proving that it has complied with the requirements of sections 1166 *et seq.* as to signals, lookout, etc.; and to do so it must necessarily show that it had all the requisite means to be thus employed. Louisville & N. R. Co. *v.* Connor, 9 Heisk. (Tenn.) 19, 19 Am. Ry. Rep. 368.

ST. LOUIS & S. F. RY. CO. *et al.*

v.

MILES.

(*Circuit Court of Appeals, Eighth Circuit, March 1, 1897.*)

Killing of workmen on Track—Joint Occupancy of Roadbed—Implied Agreement.—It appeared from the evidence that the defendant railroad company built and maintained a spur track on the land of a lumber company to enable the former to run its trains to the lumber mills; that the switching crew of the railroad company in charge of its engine knew that it was, and had been for two or three years, the custom of the lumbermen to be on the track at a certain point, at the time of the arrival of the engine, engaged in removing from over the track a tramway which was used by the lumber company for its own convenience. *Held*, that the lumbermen while so engaged were not trespassers on the track, such use of the tramway over the track without objection from defendant being equivalent to an agreement between the companies for such joint occupancy of the track.

Negligence—Evidence.—It appeared from the evidence that such switching crew left the switch open in their rear, though they knew that a fast train would be due at the switch in a few minutes; that the latter train came through the open switch and caused the engine to run into cars standing on the track near the lumber mill and caused them to run over and kill three employees of the lumber company who were at work on the track in the rear of the cars. *Held*, that the negligence of the switching crew in leaving the switch open was the sole cause of the injuries.

ERROR by defendant to the Circuit Court of the United States for the Western District of Arkansas. *Affirmed.*

L. F. Parker and *B. R. Davidson*, for plaintiffs in error.

Oscar L. Miles, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is the second appearance of this case in this court on a writ of error, which was sued out on each occasion by the St. Louis & San Francisco Railway Company *et al.*, the plaintiffs in error, who were the defendants in the trial court. A. F. Miles, as administrator of the estate of James W.

Case stated.

St. Louis & S. F. Ry. Co. *v.* Miles

Brown, deceased, sued the defendant railroad company and its receivers for negligently causing the death of his intestate at Van Buren, Ark., on November 21, 1893. On the former hearing the case was submitted in connection with two other cases of the same character, which grew out of the same accident. *Railway Co. v. Bennett's Adm'r*, 32 U. S. App. 621, 16 C. C. A. 300, and 69 Fed. 525; *Railway Co. v. Brown's Adm'r*, 32 U. S. App. 632, 16 C. C. A. 682, and 69 Fed. 530; *Railway Co. v. Spoon's Adm'r*, 32 U. S. App. 633, 16 C. C. A. 680, and 69 Fed. 531. The judgment in the case at bar against the defendant railway company was reversed on the former hearing for reasons which are fully stated in *Railway Co. v. Bennett's Adm'r*, 32 U. S. App. 621, 16 C. C. A. 300, and 69 Fed. 525. We quote from the statement in the Bennett Case certain facts disclosed by the present record, which will serve to explain the circumstances under which the injuries resulting in the death of the plaintiff's intestate were sustained:

“The scene of the accident was a spur track of the railway company, which extended from its main track at Van Buren, in the state of Arkansas, between two long lumber sheds that belong to the Long-Bell Lumber Company. The platforms of these lumber sheds were about four feet high, and the space between them in which the cars ran upon this spur track was about sixteen feet wide. It was about 4 o'clock in the afternoon of a November day in 1893. A switching engine, with its crew, had entered the spur from the main track for the purpose of moving cars on the former, and the switch had been left open. There were about fourteen freight cars upon the spur track, and between the two sheds there was an opening between two of these cars which had been made before the switching engine came upon the track. This space was about twenty feet wide. In it the employees of the lumber company had placed a tramway, one end of which rested upon timbers under the platform upon one side of the track, and the other upon the platform upon the other

side. When the railway company was not using the spur track, this tramway was used by the lumber company to enable its employees to transfer lumber across the track from one of its sheds to the other. Whenever a switching engine came upon this spur track to move cars, it had been the custom for those employees of the lumber company who happened to be nearest to the tramway to immediately jump down upon the railroad track in the space between the cars and push the tramway back under one of the platforms. At the time of this accident there were some box cars between the engine and the space where the tramway was, and about a dozen of them beyond that space. * * * The deceased was an employee of the lumber company. When the switching engine came in upon the spur track, he and five other employees of that company jumped down upon the track between the cars, and began to push the tramway back under the platform of the shed. From this hole between the lumber sheds and the platform they could not see a train or engine approaching on the railroad tracks, nor could those approaching upon the tracks see them. * * * While they were in this dangerous situation, a freight train came along the main track at a dangerous rate of speed, ran into the open switch, drove the switching engine and cars in upon the spur track, and the deceased and three of his co-laborers were caught between the cars, and killed."

On the former hearing it did not appear that any of the officers or employees of the defendant company had any knowledge that the Long-Bell Lumber Company, or its employees, had been in the habit of laying the tramway across the spur track between the lumber sheds for the purpose of moving lumber to and fro. Neither did it appear that on the occasion of the accident the presence of the deceased and his fellow laborers on the spur track between the cars was known to the defendant's employees, or that, while in the situation aforesaid, they could be seen by the servants of the railway company, who were engaged at the time in

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handling its engines and cars. In view of this state of facts, we held, in the Bennett Case, that, inasmuch as the victims of the accident had voluntarily placed themselves in a position of great danger, where they had no apparent right to be, and that, inasmuch as their presence on the spur track between the cars was unknown to the employees of the railway company, and the latter persons had no reasonable grounds to anticipate their presence at that place, the case disclosed no breach of duty which the defendant railway company owed to the persons who were engaged in removing the tramway, for which it could be held responsible. The record in the case at bar presents a different state of facts. It now appears that the spur track in question was constructed on land belonging to the Long-Bell Lumber Company several years before the accident occurred, and that it was so constructed by agreement between said lumber company and the defendant railway company for the purpose of enabling the latter company to reach the lumber company's mill and sheds with its cars, and to remove lumber therefrom. The testimony shows that for some years prior to the accident the tramway had been used by the lumber company for the purpose of moving lumber across the spur track, and that this fact was well known to the switching crew who did the switching at that place. Some of the witnesses say, in substance, that the regular switching crew would come to the lumber company's mill, if not every day, at least several days each week, either to set empty cars on the spur track or to remove loaded cars therefrom, and that on such occasions they would notify the employees of the lumber company to remove the tramway whenever they found it obstructing the track. Such, it seems, had been the uniform practice for several years prior to the accident, and no officer or employee of the railway company had ever questioned the right of the lumber company to lay the tramway across the track when it was not being used for switching purposes. In short, it is conceded on both sides that the regular switching crew of the defendant

company, whose business it was to set empty cars on the spur track and to remove loaded cars therefrom, were well acquainted for a long time prior to the accident with the practice of the lumber company in this respect.

One of the principal contentions on the part of the railway company is that, even on the state of facts disclosed by the present record, the deceased and his fellow employees were trespassers on the spur track while they were engaged in the customary way in removing the tramway, and that the railroad company owed them no duty for the breach of which it can be held responsible. We are not able to assent to this view. The spur track was evidently laid for the mutual accommodation of the lumber company and the railway company, and it was not used for the benefit of the public generally. It passed between and in close proximity to two sheds or storehouses forming a part of the lumber company's milling plant, which was in itself notice to the railway company that in the transaction of its business the employees of the lumber company would frequently be compelled to carry lumber across the track from one storehouse to the other. Besides, we think that the knowledge acquired by the switching crew, while in the discharge of their ordinary duties at that place, that the lumber company was in the habit of laying the tramway across the track, should be imputed to the railway company. The fact that such practice had continued for two or three years, that it was well known to all of the employees of the railway who had duties to perform on the spur track in question, and that no one had ever objected to such use of the track by the lumber company, should be taken as equivalent to an agreement between the lumber company and the railway company that the tramway might be laid across the track when it was not actually in use by the railway company for hauling its cars.

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Roadbed—Implied
Agreement.

It results from this view that the servants of the lumber company who were engaged in removing the tram-

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way on the occasion of the accident were in no sense trespassers on the defendant's track. They were where they had a lawful right to be, and in the performance of their ordinary duties. The lumber company and the railway company were in the joint occupancy of the track where the tramway was laid, and the latter company was under an obligation to the employees of the lumber company to exercise ordinary care in moving its engines and cars so as to avoid injuring them. In view of all the circumstances of the case, as above detailed, we are unable to say that the duty which the defendant company owed to the servants of the lumber company who were engaged in the discharge of their duties at the point in question differs in kind from the duty which a railroad company owes to persons at railroad crossings. If there was any difference, it was in the degree or amount of care that ought to have been exercised. That it was bound to take reasonable precautions to avoid injuring them is a proposition, we think, which admits of no controversy.

Counsel for the defendant have indulged in some criticism of the instructions given by the trial court touching the question of contributory negligence, and

Negligence—Evidence. in some criticism of the manner in which that issue was submitted to the jury; but,

from the standpoint from which we view the case, that subject may be eliminated from the discussion. It is manifest that the efficient cause of the death of the men who were removing the tramway—the single act of negligence—consisted in the fact that the switch opening into the main track some distance north of the place where the accident occurred was left open when the switch engine backed into the spur track. The switch was left open by the switching crew, although they well knew that a freight train was approaching rapidly from the north, and would be due at the switch in a few moments. Under the circumstances, the conduct of the switching crew in leaving the switch open was grossly negligent, and it must be regarded as the sole cause of the death of the plaintiff's intestate.

None of the men who were at the time engaged in moving the tramway, and who were subsequently killed, were aware that the switch had been left open, and they cannot be charged with negligence for failing to take precautions to guard against a peril which was unknown to them, and which they had no reason to apprehend. In their exposed situation between the two cars, where they could not be seen, it was doubtless their duty to make their situation known to the driver of the switch engine, if it was not known to him, so as to prevent his moving down upon them of his own volition before the tramway was removed. But such precaution, if it had been taken, would not have prevented the accident in question, as they were not hurt by the voluntary action of the engineer in charge of the switch engine, but solely in consequence of the open switch which permitted the coming freight train to leave the main track and enter the spur track. We think, therefore, that there was no evidence in the case tending to show contributory negligence, and that this issue might well have been eliminated from the charge. At all events, the defendant company is not entitled to complain of what was said by the trial court on that subject.

Some other errors have been assigned upon the record, and noticed in the brief, but they are without merit, and, in our judgment, do not deserve special notice. An inspection of the entire record has served to convince us that the verdict was for the right party, and that no errors were committed which can be regarded as prejudicial to the defendant company. Indeed, considering the undisputed fact that the switch was negligently left open in advance of the approaching train, and that this was the sole cause of the disaster, we do not see how the trial could have resulted differently. The judgment of the circuit court is therefore affirmed.

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MATZ *et al.*

v.

CHICAGO & A. R. Co.

(Circuit Court, W. D. Missouri, January 24, 1898.)

Action for Instantaneous Killing of Person on Track—Statutory Cause of Action.*—In an action under section 4425, Rev. St. Mo., by a husband and wife for the negligent killing of their minor son by the defendant railroad company, the complaint is not demurrable because it shows that deceased died immediately after the injury, the statute creating a new cause of action.

Alternative Allegations—Demurrer.—The question whether or not the alternative allegation in such petition complies with section 2071 of the Rev. St. Mo., which is as follows: "Either party may allege any fact or title in the alternative, declaring his belief of one alternative or the other, and his ignorance whether it be one or the other", is not raised by a general demurrer.

Scarritt, Griffith & Jones, for plaintiffs.

Wash. Adams, for defendant.

ROGERS District Judge. The complaint in this case is as follows:

"Plaintiffs, for cause of action state that they are husband and wife, and are and were the father and mother, respectively, of the child, William Matz, here-
in referred to. That the said William Matz
Case Stated. was born in the year 1888, and while he was a minor and unmarried, died, March 19, 1897, from an injury occasioned as hereafter stated. That the defendant is, and was at all the times herein referred to, a railroad corporation, duly created and existing under and by virtue of the law, and at all such times owned and operated a railroad running through Kansas City, in the state of Missouri, in an east and west direction, and across a certain street or avenue therein known as 'Agnes Avenue.' That said Agnes avenue, at the

*See note at end of case.

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times herein referred to, extended through the said Kansas City in a north and south direction, and is and was the only street or avenue running north or south connecting what is commonly known as the 'East Bottoms' with the residence portion of said city between the West road, near the Blue river and Lydia avenue, said last two named streets being about two miles apart. That the intersection of the said Agnes avenue with defendant's railroad is, and was at all such times, within the city limits of Kansas City, and is and was a thickly settled locality, in the vicinity of which are located many large factories, elevators, breweries, and other industries that give employment to a large number of people, and in the vicinity of which are many residences. That said Agnes avenue is, and was at such times, paved with a macadam thoroughfare, over and along which many people and vehicles travel daily. That at the time herein referred to no watchman was stationed, or gates or bars maintained, at the crossing of defendant's tracks and the said Agnes avenue, to warn children and the public in general of the approach of cars and engines thereto; that at all such times there was in force and effect in said Kansas City a certain ordinance numbered 41,982, entitled 'An ordinance in revision of the ordinance governing the city of Kansas,' approved May 12, 1888, section 820 of which said ordinance being as follows: 'No conductor, engineer, fireman, brakeman, or other person shall move, or cause or allow to be moved, any locomotive, tender or car, within the city limits, at a greater speed than six miles per hour, under a penalty of not less than twenty-five dollars or more than five hundred dollars.' That at the times herein referred to it became and was the duty of the defendant, in the management and operation of its said railroad, not to allow any conductor, engineer, fireman, brakeman, or other person to move or cause to be moved any locomotive or car within the city limits, and at the place aforesaid, at a greater rate of speed than six miles per hour. That on or about the 19th day of March, 1897, the defendant, wholly

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disregarding its duty as aforesaid, negligently and carelessly permitted and allowed its conductor, engineer, fireman, brakeman, and agents to move or cause to be moved, a certain locomotive and train of cars of defendant in the city limits, and at the place aforesaid, westwardly, at a greater rate of speed than six miles an hour, and carelessly permitted its said engine and cars in charge of its servants and agents aforesaid to run at a reckless and dangerous rate of speed, at the time and place aforesaid, to wit, at the rate of thirty-five miles an hour, upon and over the said William Matz, and thereby mortally wounded and injured him, from which injuries he died immediately thereafter. That said defendant company at the time and place aforesaid, acting by and through its servants in charge of the said engine and cars, carelessly and negligently caused or permitted its said engine and train, while in charge of its servants and agents aforesaid, to run upon the said William Matz, without giving him any notice or warning of the approach thereof, and without slowing up or slackening the speed thereof, and without exercising reasonable care to avoid injuring him, the said William Matz, after they, the servants and agents of defendant, in charge of its said engine and train, knew, or might by the exercise of ordinary care have known, of his position of danger and peril in time, by the exercise of ordinary care, to have avoided any injury to him; and by reason of its said negligence defendant permitted and allowed its said engine and cars to run upon and kill the said William Matz, while he was lawfully at the said crossing when and where he had a right to be. That the said William Matz died from injuries received and occasioned by the negligence and unskillfulness of the officers, agents, servants, and employees of defendant company whilst running or managing its said locomotive and cars as aforesaid, to the plaintiffs' damage in the sum of five thousand dollars (5,000)."

To the complaint a general demurrer was interposed.

Two questions were argued and submitted: (1) The complaint having alleged that the deceased died imme-

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diately after the injury was received, it is contended that the deceased had no cause of action in his lifetime, and could, therefore, transmit none to the plaintiffs, under section 4425, Rev. St. Mo., under which section the action was brought. (2) That the complaint having alleged that the defendant company "run upon the said William Matz without giving him any notice of the approach thereof, and without slowing up or slackening the speed thereof, and without exercising reasonable care to avoid injuring him, the said William Matz, after they, the servants and agents of defendant in charge of its said engine and train, knew, or might by the exercise of ordinary care have known of his position of danger and peril in time, by the exercise of ordinary care, to have avoided any injury to him," that the alternative allegation, "knew, or by the exercise of ordinary care might have known," etc., does not comply with section 2071 of the Revised Statutes of Missouri, which is as follows: "Either party may allege any fact or title in the alternative, declaring his belief of one alternative or the other, and his ignorance whether it be the one or the other." The court sustained the demurrer on the first ground, and, without much consideration as to the second ground, suggested to plaintiffs to so amend their complaint, if they elected to amend, as to conform to the last-named statute. On motion of plaintiffs, the court subsequently heard a reargument of the demurrer, vacated the order sustaining it, and took the same under advisement. The questions stated are the ones to be decided.

As to the first question, it will be noted that the suit is brought by the father and mother, and not by the father alone. At common law, and under the laws of Missouri also, the father has a property in the services of his son during his minority, for which he may sue and recover if he is deprived of such services by the misconduct of another. *James v. Christy*, 18 Mo. 162; *Stanley v. Bircher*, 78 Mo. 245; 2 Sedg. Dam. (8th Ed.) § 575. In such cases, however, loss of service must be

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alleged. 2 Sedg. Dam., *Supra*. No allegation of that kind or kindred nature is found in the complaint. If William Matz had survived the injury alleged, but lost an arm or leg, or sustained any permanent injury, he might have sued by his next friend, and recovered therefor. He might also have recovered for pain and suffering. But he is not shown to have lived after the injury was received. On the contrary, it is alleged he immediately died. No authority need be cited to show that at common-law such an action could not be maintained by the father or mother or both, or by any one else. "*Actio personalis moritur cum persona*," was the common law maxim, and it applied to infants as well as adults. But the rule of the common law has been changed in England, by what is commonly called the "Lord Campbell's Act," enacted in 1846, and which has served as a model for similar acts in most of the states of the United States. Tiff. Death Wrongf. Act 4. In Missouri, the damage act, similar to the Lord Campbell act, is found in sections 4425-4427 of the Revised Statutes. It has been in force more than 40 years. It is inartistically, if not bunglingly, drawn. It has been construed by the supreme court of Missouri many times. The judges of that court have disagreed as to its meaning, and the court has overruled itself as to the proper construction of it, and even now I am not able to reconcile the language and the logic of the different opinions of that court which have not been expressly overruled. The wonder is that such a statute could remain in force so long. Confessedly, this action is brought under section 4425, *supra*, which, for convenience I will hereafter call the second section of damage act. In what respect did that statute change the common law? Did it create a new cause of action and give it to the parties designated in the statute? Or did it simply transmit a cause of action which the deceased had in his life time to the persons designated in the statute? If the former, this action is clearly maintainable; if the latter, it would seem it is not. On the argument, it was conceded by the defendant's counsel

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that, as an original proposition, he thought the statute created a new cause of action. In that view I concur, and I think it is the only construction which does not involve absurdities. It was also conceded that, if the supreme court of Missouri has decided the statute does not create, but simply transmits, a cause of action, the circuit court of the United States should follow it. In this I concur. But it was insisted by counsel for plaintiffs that, if the supreme court of Missouri has not passed upon the precise point presented, expressions of that court used in construing that statute when other points, and not the one at bar, were under consideration, do not bind the circuit court of the United States, and are, indeed, no precedent for the court delivering the opinion. On this point, in *Cohens v. Virginia*, 6 Wheat. 399, MR. CHIEF JUSTICE MARSHALL said:

"The counsel for the defendant in error urge, in opposition to this rule of construction, some dicta of the court in the case of *Marbury v. Madison*, 1 Cranch, 174. It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

In *Carroll v. Carroll's Lessee*, 16 How. 286, MR. JUSTICE CURTIS said:

"If the construction put by the court of a state upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there

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must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties, and decide to whom the property in contestation belongs.

I think the contention of the plaintiffs on this point must be conceded.

Sections 4425, 4426, and 4427 of the Revised Statutes of Missouri, which are sections 2, 3, and 4 of the damage act of Missouri, are as follows :

“Sec. 4425. Damages for Injuries Resulting in Death in Certain Cases, When and by Whom Recoverable.— Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee whilst running, conducting or managing any locomotive, car or train of cars, or of any master, pilot, engineer, agent or employee whilst running, conducting or managing any steamboat, or any of the machinery thereof, or of any driver of any stage coach or other public conveyance whilst in charge of the same as a driver ; and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or in any steamboat, or the machinery thereof, or in any stage coach or other public conveyance, the corporation, individual or individuals, in whose employ any such officer, agent, servant, employee, master, pilot, engineer or driver shall be at the time such injury is committed, or who owns any such railroad locomotive, car, stage coach, or other public conveyance at the time any injury is received, resulting from or occasioned by any defect or insufficiency, unskillfulness, negligence or criminal intent above declared, shall forfeit and pay for every person or passenger so dying the sum of five thousand dollars, which may be sued for and recovered ; First : by the husband or wife of the deceased, or second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased, whether such minor child

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or children of the deceased be the natural born or adopted child or children of the deceased ; provided that if adopted such minor child or children shall have been duly adopted according to the laws of adoption of the state where the person executing the deed of adoption resided at the time of such adoption ; or third, if such deceased be a minor and unmarried, whether such deceased unmarried minor be a natural born or adopted child, if such deceased unmarried minor shall have been duly adopted according to the laws of adoption of the state where the person executing the deed of adoption resided at the time of such adoption, then by the father and mother who may join in the suit, and each shall have an equal interest in the judgment ; or if either of them be dead, then by the survivor. In suits instituted under this section, it shall be competent for the defendant, for his defense, to show that the defect or insufficiency named in this section was not of a negligent defect or insufficiency, and that the injury received was not the result of unskillfulness, negligence or criminal intent.

“Sec. 4426. When Representative May Sue.—Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.

“Sec. 4427. Damages, by Whom Recovered.—Measure of. All damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in section 4425, and in every such action the jury may give such damages, not exceeding five thousand dollars, as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and also hav-

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ing regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default''

Bearing in mind the principles announced, *supra*, let us examine the Missouri decisions. The first which has been called to my attention is *Schultz v. Railroad Co.*, 36 Mo. 13. In that case the widow of an employee of the defendant company brought suit for the death of her husband, and recovered on the theory that section 4425 rendered the defendant company liable for the negligence of a fellow servant of the plaintiff. The supreme court of Missouri affirmed the judgment in that case. It does not appear that deceased was instantly killed. The precise question at bar was not, therefore, involved. The opinion turned upon the question as to what the proper meaning of the words "any persons," used in the second section of the statute, meant, and the court held that it included employees; indeed, included all persons. The effect of the decision was, therefore, to make the defendant company liable for the "negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employee whilst running, conducting, or managing any locomotive, car or train of cars," etc. All the judges concurred. The opinion was delivered by JUSTICE HOLMES. In *Connor v. Railroad Co.*, 59 Mo. 292, the point decided in the *Schultz Case* was assailed. The suit was by the wife for the death of her husband. The opinion of the court was delivered by JUSTICE NAPTON, who, in a vigorous, learned, and able argument, expressed his dissent from the doctrine announced in the *Schultz Case*. In a separate opinion, exhaustive, and I think, convincing, JUSTICE HOUGH concurred with JUDGE NAPTON that the *Schultz Case* was unsound. JUSTICES WAGNER, VORIES, and SHERWOOD, in a dissenting opinion, concurred in reversing the case on another point, but adhered to the doctrine announced in the *Schultz Case*. It does not appear that deceased, Connor, was instantly killed, and therefore the precise point at bar was not raised. In the

opinion of JUSTICE NAPTON, while reviewing the precise point decided in the Schultz Case, he says :

“The common-law axiom, that ‘*actio personalis moritur cum persona*,’ was the mischief which the legislature wished to abolish, and at the same time to point out the survivors who should have the right of action. The distinctions between the right of action in passengers and employees, and the cases in which the one or the other might maintain actions, were not in the mind of the legislature in framing this enactment. They were looking in a different direction, and the use of the term ‘person’ in the first clause of the section, and the term ‘passenger’ in the second, and of either ‘passenger or person’ towards the conclusion, was merely a blunder of the draftsman, who, disregarding all the rules of punctuation, and delighting, apparently, in obscure, complicated, and tautological phraseology, seems suddenly, after half completing the section, to have dropped in the word ‘passenger’ at the very place where it ought to have been omitted, and left it out at the very place where it should have been inserted in order to have carried out the real design of the act. The word ‘person,’ if carried through the section, would have answered, or the words ‘person or passenger’ in all the clauses could have created no confusion or doubt. There was no intention of establishing any new rules of liability for damages to the party injured, where he was alive, and entitled to his action, but simply to extend the benefit of that liability to certain members of the family of the injured person when death resulted from the injury. Had any such design been entertained, it was a simple and easy task to be accomplished in plain, clear and unmistakable language. * * * But the third section clearly announces the object of the legislature, which was to give no new cause of action, to legislate into existence no new grounds of recovery, but to give to certain representatives of a dead man a right of action which did not before exist in such representatives, where the man, if living, would have had one, and in no other case.”

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MR. JUSTICE HOUGH, in his separate opinion in the Connor Case, 59 Mo. 308, while reviewing the point decided in the Schultz Case, uses this language :

“It is evident to my mind, from the whole scope of the damage act, that the purpose of the legislature in the second section was simply to cause those actions to survive to certain representatives of the deceased in the cases there named, which according to the rules of the common law died with the person, and to limit the amount of recovery in such cases. No new right of action is given as to passengers or strangers in the second section,—that is to say, the right of action which the passenger himself, or a stranger, would have had, if injured, but not killed is made, in the event of death, to survive ; and if the words ‘any person’ shall be held to mean passengers and strangers, and such employes only as are not fellow servants of those causing their death, then no new liability will be created as to any one by the second section, and the several parts of this statute will constitute a consistent and harmonious whole.”

The next case is that of Proctor v. Railroad Co., 64 Mo. 119. The suit was by the wife for the death of her husband, an engineer on the defendant company’s road, and the complaint alleged he was “instantly killed.” The suit was brought under the second section of the damage act. In that case recovery was had.

On the trial the defendant objected to the introduction of any evidence (1) because there is no cause of action stated in the petition ; (2) because the plaintiff seeks to recover in this cause on account of the death of her husband, Joseph Proctor, who was an employee of defendant at the time of his death, which was occasioned by the negligence or carelessness of co-employees of defendant. The court overruled the objections. On appeal, NORTON, J., delivering the opinion, said :

“The point presented for our determination involves the construction of Wag. St. p. 519, § 2 (Rev. St. § 4425), especially as to whether under the words ‘any person,’ in said section, a fellow servant, when death is occas-

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ioned by the negligence of a fellow servant, without fault of the master, is, or was intended to be, included. The determination of this point will be decisive of this case."

In an able opinion the precise point in the Schultz Case is expressly overruled. HENRY, J., dissented, adhering to the Schultz Case, and discusses other points, and interprets the three sections of the damage act. It will be seen that the precise point at bar was not discussed by the court or in the dissenting opinion, although it seems to me the first objection to the admission of any evidence fairly raised it. The case was reversed, the court holding that the words 'any person' in the statute do not embrace a servant injured by the negligence of a fellow servant.

In the Proctor Case, *supra*, the court says :

"Under the view of plaintiff, the right to sue is not a transmitted right, but an original right, arising or appearing for the first time at the instant of the death of him or her through whom the right is derived. The very force of the second section is at war with any other idea than that the right to sue was intended to be a transmitted right, and not an original right.
* * * It manifestly appears from these provisions—for they apply to the injuries alluded to in section 3 as well as to those in section 2—that it must have been in the mind and intention of the legislature only to confer upon the above classes of persons the right to sue in cases where the husband, wife, or child could have sued, had not death been the result of the injury.

In *White v. Maxcy*, 64 Mo. 553, the deceased, White, lived a day after injured, so that the precise question at bar was not raised or decided, but NAPTON, J., delivering the opinion, said :

"Neither of these sections [sections 4425, 4426, Rev. St. Mo.] created any new cause of action, but provided for a survival of a cause of action which existed at the common law, where the death of the party injured occurred, to certain representatives of the deceased party,

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and limited the amount of the recovery to a specific sum."

In *Elliott v. Railroad Co.*, 67 Mo. 273, the court follow the Proctor Case, HENRY. J., dissenting, and adhering to the Schultz Case. The court said:

"The suit can only be maintained when the deceased, had he lived, could have recovered damages for his injury; and the same evidence as to the cause of the injury is required in a suit by his representative that would have been required had he survived, and sued for the injury."

In this case the suit was brought under the second section, but the court held it should have been brought under the third section, of the damage act. The precise point at bar was not decided.

In *Sullivan v. Railway Co.*, 97 Mo. 120, 10 S. E. 852, the Proctor Case, *supra*, is again approved, but the precise point at bar was not discussed or decided. Opinion was by BLACK, J., and no dissent, the personnel of the court having, in part, changed.

In *Gray v. McDonald*, 104 Mo. 311, 16 S. W. 398, BLACK, J. delivering the opinion said:

"This section [the third section of the damage act], like the preceding one, does not, as is often supposed, create a new cause of action when the injured person would have had one had death not ensued. In other words, the cause of action does not abate by reason of the death of the person injured. * * * If the injured party would have had a common-law or statutory cause of action had death not ensued, then the cause of action survives to the designated person."

The precise point at bar was not raised or decided in this case, it appearing affirmatively that Gray, the deceased, was not instantly killed.

In *Miller v. Railroad Co.*, 109 Mo. 361, 19 S. W. 58, BLACK, J., delivering the opinion, the Proctor Case, *supra*, is followed and approved, but the precise question at bar was not decided. It does not appear that Miller was instantly killed.

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Apparently in conflict with the foregoing opinions is that delivered by Judge BLACK in *Crumpley v. Railroad Co.*, 98 Mo. 35. 11 S. W. 244. The suit was by the widow for the death of her husband, and it does not appear that the deceased was instantly killed. The precise point at bar was not before the court, but the court said :

“Sections 2121, 2122, and 2123 [Rev. St. 1879] of the damage act give to representatives of the deceased person a cause of action where none existed in their favor at common law. In other words, if the injured party would have had a cause of action had death not ensued, then these sections give to the designated representatives a cause of action, and, if the case comes within section 2121, the defendant shall forfeit and pay the sum of five thousand dollars.”

What Judge Black meant, I think, is clear from what he had previously said in the *Sullivan Case*, *supra*, and subsequently in *Gray v. McDonald* and in the *Miller Case*, *supra*, where no intimation is given of any change in his mind as to the construction of the damage act.

I think the logic of the Missouri decisions, *supra*, is to the effect that the damage act of Missouri is a survival statute; that it transmits, but does not create, a cause of action. The language used by the court is different in different cases. Various terms and phraseology have been used by the different judges, and confusion may have grown out of inaccurate terms used. The *Century Dictionary* defines a cause of action to be “the situation or state of facts which entitles a party to sustain an action.” Certainly the statute does not create any new “situation or state of facts.” It does give to the persons designated in the statute a right to sue on a “situation or state of facts” upon which such persons could not have sued before the enactment of the statute. In *Douglas v. Beasley*, 40 Ala. 148, “cause of action” is defined as “a right to bring an action, which implies that there is some person in existence who can assert, and also a person who can lawfully be sued.” Until the enactment of the statute, nobody had the

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right to bring an action for a personal injury resulting in instant death. The statute gave that right—if it exists—to the person designated therein. In *Veeder v. Baker*, 83 N. Y. 160, “cause of action” is defined as follows: “It may be said to be composed of the right of the plaintiff and the obligation, duty, or wrong of the defendant; and these combined, it is sufficiently accurate to say, constitute the cause of action.” In the case at bar the plaintiffs would have had no “right” had the statute not been enacted. In *Jackson v. Spittall*, L. R. 5 C. P. 522, “cause of action” is defined as “the act on the part of the defendant which gives the plaintiff his cause of complaint.” Until the enactment of the statute, no act of a defendant, in a case like the one at bar, gave a cause of complaint to any one. The cause of complaint died with a party, when instantly killed. In *Meyer v. Van Collem*, 28 Barb. 231, “cause of action” is defined as “the right which a party has to institute and carry through such a proceeding.” But, as stated, no one had the right to institute an action for a personal injury resulting in death until the enactment of the statute, whether instantly killed or not. It seems to me the plain import of the third section of the statute is to give a cause of action as defined, *supra*, to the parties designated in the statute, where none existed before in anybody, and to limit the recovery to \$5,000; that defendant could avail itself of any defense which it could have invoked before the statute was enacted, except the death of the injured party. It abolished that defense. That, to recover, the parties designated in the statute must establish just such a case as the deceased would have had to establish if he had sued and recovered before his death for the same injury, and, in addition, to show that the injured person was dead, and that they are the persons designated in the statute, who are authorized to sue. The damages being liquidated, no evidence on that line is required.

In *White v. Maxcy*, *supra*, Judge NAPTON said:

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“Neither of these sections[sections 4425, 4426, Rev. St. Mo.] created any new cause of action, but provided for survival of a cause of action which existed at common law, where the death of the party injured occurred, to certain representatives of the deceased party, and limited the amount of the recovery to a specific sum.”

Apply that interpretation of the statute to a case of “instantaneous death.” At common law, in a case of personal injury producing instantaneous death, there was no cause of action in anybody. If there was no cause of action at common law in such a case, none could survive or be transmitted. A cause of action which never had an existence could neither survive, abate, nor be transmitted. It seems to me, therefore, that the statute gives a cause of action, or it does not exist at all. I think the logic of the opinions of the supreme court of Missouri above referred to leads inevitably to the conclusion that, where the death of the party injured is instantaneous, or contemporaneous with the injury causing the death, no action can be maintained; but I have reviewed these decisions to show that that court has not thus far expressly so decided; nor do I believe, when the question at bar is squarely presented, it will so decide. I am confirmed in this view by the fact that in the Proctor Case the petition alleged the deceased was “instantly killed.” In *Carroll v. Railway Co.*, 88 Mo. 242, it was alleged that “death was instantaneous,” and the court sustained a judgment for \$5,000. In these cases the question at bar was not raised, nor was it noticed. Is it probable that all the learned judges and counsel engaged in deciding and prosecuting these suits, and the various suits under this act, overlooked this precise question? It seems hardly credible.

The uniform and contemporaneous action and opinion of the bench and bar should have weight in determining the construction of a statute. *Venable v. Railway Co.*, 112 Mo. 125, 20 S. W. 493. Moreover, other courts have held to this view, upon similar statutes. *Brown v. Railroad Co.*, 22 N. Y. 191; *Whitford v.*

Notes

Railroad Co., 23 N. Y. 465; *Reed v. Railroad Co.* (S. C.) 16 S. E. 291; *Mason v. Railway Co.* (Utah) 24 Pac. 797; *Railroad Co. v. Kindred*, 57 Tex. 491; *Hulbert v. City of Topeka*, 34 Fed. 510. Indeed, the learned counsel for the defendant admit that, unless the supreme court of Missouri have decided to the contrary, as an original proposition, the statute gave a new cause of action. Whether you call the right to sue, which the statute confers on parties designated therein, a transmitted right or an original right, whether you call the suit a transmitted cause of action or a new cause of action, I think it is clear that the legislature intended the persons designated in the statute should have a cause of action whether the party died simultaneously with the injury, or survived, lingered, and died afterwards. I can see no reason, either in law or in common sense, why they should have a cause of action if he was injured, lingered, and died, but have no cause of action at all if he was instantly killed. The very fact that the recovery, if had, is a liquidated sum, and does not go to the estate, but to the persons designated, tends to show it is compensation for death alone, and not for pain, suffering, expenses incurred, and death. On this point the demurrer should be overruled.

As to the second point, I am not sure that the question can be raised by demurrer. I rather incline to the view that it should be raised by motion to make more specific or definite and certain. At all events, I do not think it can be raised by a general demurrer. Rev. St. Mo. § 2044, and cases cited in note f. The demurrer should be overruled on that point. The defendant will be allowed a reasonable time to plead.

Alternative Allegations—Demurrer.

NOTE.

Whether Action Lies Where Death Was Instantaneous.—An administrator of a person killed by a collision on a railway cannot maintain an action for such injury under Mass. St. 1842, ch 81, § 1, where the death of the intestate was instantaneous with the collision. *Kearney v. Boston & W. R. Corp.*, 9 Cush. (Mass.) 108.

Note

An action for personal injuries caused by falling a distance of forty feet, and resulting in instant death on reaching the ground, cannot be maintained. *Moran v. Hollings*, 125 Mass. 93.

A husband cannot maintain an action for the loss of a wife's services where it appears that she was killed instantly. *Grosso v. Delaware, L. & W. R. Co.*, 50 N. J. L. 317, 11 Cent. Rep: 574, 13 Atl. Rep. 233; *Lucas v. New York C. R. Co.*, 21 Barb. (N. Y.) 245.

In determining whether a cause of action accrued to a party who was fatally injured by the negligence of another, the test is whether he lived after the injury, and not the length of time he lived thereafter. *Kellow v. Central Iowa River Co.*, 21 Am. & Eng. R. Cas-485, 68 Iowa 470, 23 N. W. Rep. 740, 27 N. W. Rep. 466.

The continuance of life after the accident, and not insensibility or want of consciousness, is the test by which to determine whether a cause of action survives. So where a passenger lived 15 minutes after the accident, but was unconscious during the time, the action is maintainable. *Bancroft v. Boston & W. R. Corp.*, 11 Allen (Mass.) 34.

Under Conn. Rev. St. tit. 1, § 83, an action can be maintained where the death is instantaneous. *Murphy v. New York & N. H. R. Co.*, 30 Conn. 184.

At common law a right of action for a tort died with the person injured, but under So. Car. Gen. St. §§ 2183-2186 a right of action and recovery for a personal injury resulting in death is given to the legal representative of the deceased for the benefit of certain dependent kindred against the party whose wrongful act caused such death, wherever the party injured, if he were still alive, could recover for such injury. Therefore, the right of action by the administrator is not defeated by the fact that the intestate had died instantly from the injury. *Reed v. Northeastern R. Co.*, 37 So. Car. 42.

When the death is alleged in the complaint to have been instantaneous with the accident causing it, no right of action could have accrued to the deceased, because the life closed with the accident, and none could therefore accrue to his personal representative. The complaint, therefore, is fatally defective. *Belding v. Black Hills & Ft. P. R. Co.*, (S. Dak.) 52 Am. & Eng. R. Cas. 624, 53 N. W. Rep. 750.

Under Nev. Comp. L. p. 39, § 115, providing a recovery for injuries causing death, it is immaterial whether the death of the person is immediate or consequential. *Roach v. Consolidated Imperial Min. Co.*, 7 Sawy. (U. S.) 224.

Under the New York Act of 1847, an action may be maintained for causing death by wrongful act, whether it is instantaneous or not. *Brown v. Buffalo & S. L. R. Co.*, 22 N. Y. 191.

Under Tex. Rev. St. arts. 2899, 2900, an action for actual damages lies in favor of the parent, etc., for damages against a corporation for negligently causing death, whether an action ever accrued in favor of the deceased or not. Such action lies in case of the instantaneous death. *International & G. N. R. Co. v. Kindred*, 11 Am. & Eng. R. Cas. 649, 57 Tex. 491.

Beem v. Tama & T. Electric Railway & Light Co

BEEM

v.

TAMA & T. ELECTRIC RAILWAY & LIGHT CO.

(Supreme Court of Iowa, Jan. 28, 1898.)

Street Railways—Injuries to Deaf Persons on Track—Contributory Negligence.*—Decedent, who was 71 years of age and quite deaf, a few moments before the collision was seen walking on the street parallel to, and a short distance from defendant's railway track; and while attempting to cross it was struck by a train, which he could have seen approaching from a distance of 550 feet. *Held*, that the evidence warranted the direction of a verdict for defendant.

APPEAL by plaintiff from Tama county district court. *Affirmed*.

T. Brown, for appellant.

Struble & Stiger, for appellee.

ROBINSON, J. In September of the year 1895, the defendant was engaged in operating an electric railway between points in Toledo and Tama. The railway passed through a portion of McClellan street, which extends from north to south, over a ridge. At a point from 400 to 500 feet south of the crest of the ridge, McClellan street is intersected by Erice street, which extends from east to west. On the 12th day of the month named, A. B. Beem, the decedent, was struck by a train of the defendant in McClellan street, at a point north of, but near, Brice Street, and received injuries which caused his death within a short time. The train in question was composed of a freight car, and an electric motor behind it. The plaintiff alleges that the defendant was negligent in operating its train with the freight car in front of the motor, in not having a person on the car to keep a lookout for persons on the

*See note at end of case.

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track, in not having the car supplied with a brake, in running the train at a higher rate of speed than was permitted by the ordinance of the city of Tama, in which the accident occurred, and in not stopping the train after the peril of the decedent was known, and before he was struck. The evidence for the plaintiff shows the following facts: At the time of the accident the decedent was 71 years of age, and quite deaf. A few moments before the collision he was seen to be walking southward on McClellan street, parallel to, and a short distance east of, the railway track. Just before the collision occurred, he turned, and walked in a southwesterly direction, to cross the track, and was then struck. He is not shown to have looked towards the approaching train, although he could have seen it for a distance of 550 feet before it reached the place of the accident. He resided west of the railway track, and not far from the place where he was hurt. The grade of the railway descended from the crest of the ridge southward, and, although the evidence as to the speed of the train is not satisfactory, it may be conceded that the jury would have been justified in finding that it was greater than the city ordinance permitted, and that the accident was due in part to negligence on the part of the defendant. It remains to be determined whether the jury would have been authorized to find that the decedent was free from negligence which contributed to the accident. It is true, as contended by the appellant, that it is the duty of persons in charge of a street car to be watchful and diligent to avoid doing injury to others, but persons who cross street-railway tracks also have duties to perform. They cannot assume that, without care on their part, they will be seen, and protected from harm, and the car stopped, if necessary to avoid a collision. They are not, as a rule, required to use the same degree of care as would be required if they were about to cross an ordinary commercial railway track. *Orr v. Railway Co.*, 94 Iowa, 426, 62 N. W. 851. But street cars are usually operated according to established time

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schedules, and their efficiency and value to the public demand that they be so operated. To require, whenever a person approaches the track, that they be stopped, or their speed be slackened, until it is evident that the person will not be endangered by the running of the cars, would be to impose a serious, and in many cases an intolerable, burden upon the railway corporation, and to subject its patrons to annoying and injurious delays, without any substantial reason for so doing, or benefit of importance to any one. Ordinarily a pedestrian who approaches a street-railway track may, and does, without appreciable effort or loss of time, ascertain if a car be near, and it is his duty to do so. *Fenton v. Railroad Co.*, 126 N. Y. 625, 26 N. E. 967; *Fleckenstein v. Railroad Co.*, 105 N. Y. 655, 11 N. E. 951; *Adolph v. Railroad Co.*, 76 N. Y. 530; *Schwartz v. Railway Co.*, 30 La. Ann. 15; *Buzby v. Traction Co.*, 126 Pa. St. 559, 17 Atl. 895.

The only conclusion which can reasonably be drawn from the evidence in this case is that the decedent did not take any precaution to avoid the accident. Although he was unable to hear readily, and therefore should have been more diligent to discover the approach of the train by the sense of sight, he could not have looked in the direction of the car when about to cross the track. There is no room for the presumption which arises in some cases, that the natural instincts of the decedent led him to use reasonable care to avoid the accident. The evidence clearly shows that he could not have done so without avoiding it. It may be (although it is not shown) that the employee in charge of the train saw the deceased while he was walking southward near the track; but, if so, the employee had no reason to suppose that the decedent would turn towards, and attempt, to cross, the track, without looking for and avoiding the train. Until there was reasonable ground for concluding that he might do so, the employee had the right to rely upon the presumption that he would exercise the caution which a person of ordinary prudence would have exercised. It is not shown that when the

Note

decedent turned towards the railway track, to cross it, the car could have been stopped in time to avoid the collision. On the contrary, it is clear that the car could not then have been stopped before it occurred. We conclude that the evidence would not have authorized a recovery by the plaintiff, and the verdict was therefore properly directed for the defendant. The judgment of the district court is affirmed.

NOTE.

Injuries to Deaf Persons on Track—Contributory Negligence.—See 34 Am. & Eng. R. Cas. n. 38 *et seq.* Where a party who is about to cross a track is deaf, and it appears that by looking he could have seen the train in time to have avoided an accident, it shows a great want of care in not looking the more carefully, as he could not hear. *Illinois C. R. Co. v. Buckner*, 28 Ill. 299.

So where a deaf person approaches a crossing along a private way, with a high fence on either side, and steps on the track without looking to see whether a train is in sight, and is killed in consequence, he is guilty of such contributory negligence as will preclude a recovery of damages for his death by his administrator. *Johnson v. Louisville & N. R. Co.*, 13 Am. & Eng. R. Cas. 623, 91 Ky. 651, 25 S. W. Rep. 754.

Where an adult steps upon a track in front of and in full view of an approaching train, those in charge have the right to presume that he will leave it before the train reaches him; and in case the person is deaf, or otherwise deficient in his faculties, so as to render him unconscious of his impending danger, the knowledge of such infirmity must be brought home to those in charge of the train before the company can be made liable. *Johnson v. Louisville & N. R. Co.*, 13 Am. & Eng. R. Cas. 623, 91 Ky. 651, 25 S. W. Rep. 754.

Plaintiff, a man of mature years, in his right mind, with his eyesight unimpaired, but deaf, without looking to see if a train was coming went upon a track and started down the track, when he was almost instantly struck and injured by a train approaching from behind. A short distance before reaching the track he passed a point where the train was in full view; and a sidewalk for the use of pedestrians ran alongside the track. *Held*, a case of negligence precluding recovery against the company. *Zimmerman v. Hannibal & St. J. R. Co.*, 2 Am. & Eng. R. Cas. 191, 71 Mo. 476.

The deafness of the plaintiff being conceded, in determining whether the servants of the defendant company used such care as was incumbent upon them, the jury should have been given to understand, in the absence of knowledge on their part that the plaintiff was deaf, that the conduct of such employees should be considered as though plaintiff was not thus deficient, and their care measured from that standpoint. *International & G. N. R. Co. v. Garcia*, 75 Tex. 583, 13 S. W. Rep. 223.

A greater degree of care would be incumbent upon a deaf man in crossing or walking upon a track than on one having his senses perfect. *International & G. N. R. Co. v. Garcia*, 75 Tex. 583, 13 S. W. Rep. 223.

Parker v. New York Cent. & H. R. R. Co

PARKER

v.

NEW YORK CENT. & H. R. R. Co.

(County Appeals of New York, March 1, 1898.)

Injury to Employee—Incompetency of Fellow Servant*—Evidence.—In an action by an engineer against the railroad company for injuries sustained in a collision caused by the negligence of the brakeman of the other train, plaintiff, being a fellow servant as to such brakeman, in order to maintain his action had to show that the company knew that the brakeman was incompetent; and such incompetency must be shown by specific acts, and not by general reputation.

Same—Knowledge of Master*—Evidence.—But the company's knowledge of such incompetency may be shown by evidence tending to establish that it was generally known in the community.

Same—Evidence of Incompetency.—Testimony to show that such brakeman had been called "crazy Brown" eight or ten years prior to the accident should have been excluded.

APPEAL by defendant from Fourth department supreme court, general term. *Reversed.*

Frank Hiscock, for appellant.

Louis Marshall, for respondent.

HAIGHT, J. This action was brought by the plaintiff, who was an engineer in the employ of the defendant, to recover for injuries sustained by reason of a collision with a freight train, caused by the negligence of one Brown, a brakeman in the employ of the defendant. The freight train, on the evening of November 21, 1891, had been switched from its regular track to the east-bound passenger track near Canastota, and had proceeded eastward a little over a mile from that station, when it became stalled, and the train broke in two, leaving the rear portion of the train

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*See notes at end of case.

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stationary at a point about 800 feet east of the end of a curve. Sanford Brown was the rear brakeman upon the train, and it then became his duty to go back upon the track, and signal the approaching train, so as to prevent a collision. The plaintiff was following upon the mail and express train known as "No. 32" and it is claimed that Brown neglected to go back a sufficient distance from his train to give the signals required to prevent a collision, and that, owing to his neglect of duty in this regard, a collision occurred, in which the plaintiff suffered the injuries for which this action was brought.

Inasmuch as the plaintiff and Brown were co-servants, this action could not be maintained without showing that Brown was an incompetent man, unfit for the service in which he was engaged, and that such incompetency was known or should have been known, by the officers of the defendant. It appears that he was 35 years of age, and was born at Corinth, Saratoga county, in this state; that from early boyhood he had lived in the city of Schenectady, and attended the Union school at that place, and in 1881 entered the employ of the New York Central & Hudson River Railroad Company and ran upon a train as a brakeman, between West Albany and DeWitt, for a period of about two years. After this he entered the employment of Saul & Davis, in Syracuse, hardware merchants, for a time, and then again entered the employ of the New York Central & Hudson River Railroad Company under a Mr. White, the master mechanic at Syracuse. He served as an accountant and assistant book-keeper for about three years and six months, after which he went to Louisville in the state of Kentucky, and entered the service of the Louisville & Nashville Railroad as brakeman. He then became yard clerk, and after that service clerk and detective for the road. In 1890 he returned to this state, and again entered the employ of the defendant as extra conductor, and served about seven months. He then returned to Louisville, and in August, 1891, re-

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turned to this state, and was employed as a flagman, and continued in such employment down to the time of the accident.

The plaintiff, in order to establish his cause of action, gave considerable evidence with reference to the general reputation of Brown for carelessness, which was taken under the objection and exception of the defendant, which we shall not consider in detail. The character of this evidence has recently been under consideration in this court in the case of *Youngs v. Railroad Co.*, 154 N. Y., 764, 49 N. E.—. Inasmuch as there was no opinion written in that case, we will briefly allude to the facts and the question decided. In that case, as in this, it became necessary to show that an employee was incompetent. This the plaintiff sought to do by showing his general reputation for carelessness from the speech of people. It was objected to by the defendant. The objection was sustained, and an exception was taken by the plaintiff. The court then stated to the plaintiff's attorney: "I will allow you to show any specific acts of negligence on the part of the engineer while engaged in the business of engineering, and I will allow you to show that those acts of carelessness were generally known in the community, and that the defendant had actual knowledge of such specific acts, or that they were so general that, upon proper inquiry, the defendant ought to have known." A nonsuit was granted, and the same was affirmed in the general term of this court. We are aware that in some states the courts have permitted incompetency of servants to be shown by general reputation, but we have never gone to that extent in this state. It appears to us that the safer and better rule is to require incompetency to be shown by the specific acts of the servant, and then that the master knew or ought to have known of such incompetency.

The latter may be shown by evidence tending to establish that such incompetency was generally known in the community.

same—Knowledge
of incompetency—
Evidence.

Marrinan v. Railroad Co., 13 App. Div. 439, 43 N. Y. Supp. 606; *Baulec v. Railroad Co.*, 59 N. Y.

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356; *Monaban v. City of Worcester*, 150 Mass. 439, 23 N. E. 228; *Gilman v. Railroad Co.*, 13 Allen, 433; *Davis v. Railroad Co.*, 20 Mich. 105.

One Dean was sworn as a witness for the plaintiff and testified that he knew Brown when he worked for the defendant at Schenectady. He testified that he had never heard his mental characteristics talked about, and knew nothing of his mental reputation but stated that he had heard of a handle to his name,—a nickname. He was then asked to give his nickname. This was objected to. The objection was overruled and exception taken, and the witness answered that he was called "Crazy Brown." This was 8 or 10 years before, and he had not heard him spoken of before this accident within the last 10 years. We think that this evidence was prejudicial and incompetent, and, without considering the other numerous exceptions in the case, that a new trial should be granted. The judgment should therefore be reversed, and a new trial granted, with costs to abide the event. All concur, except GRAY, J., absent, and MARTIN, J., not sitting. Judgment reversed.

Same—Evidence of
Incompetency.

NOTES.

Incompetency of Fellow Servants—Liability of Master.—See 4 Am. & Eng. R. Cas. N. S. a. 447, 448, 449.

While evidence of single acts may be admissible to prove the incompetence of a servant, such evidence is not necessarily conclusive.

Lee v. Detroit Bridge & Iron Works, 62 Mo. 565; *Cooper v. Milwaukee & P. R. Co.*, 23 Wis. 668; *Couch v. Watson Coal Co.*, 46 Iowa, 17.

In *Frazier v. Pa. R. Co.*, 38 Pa. St. 105, the court refused to permit the introduction of specific acts of negligence on the part of a servant alleged to be incompetent, for the purpose of charging the defendant company with knowledge of the servant's incompetence. See also *Hatt v. Nay*, 141 Mass. 186; *contra*, *Pittsburg, F. W. & C. R. Co. v. Ruby*, 38 Ind. 294.

Negligence, such as unfits a person for service, or such as renders it negligent in a master to retain him in his employ, must be habitual rather than occasional, or of such a character as renders it imprudent to retain him in service. A single exceptional act of negligence will not prove a servant to be incapable or negligent,—Bal-

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timore Elevator Co. *v.* Neal, 65 Md. 438,—and is insufficient to warrant the jury in inferring negligence on the part of the master in retaining such servant. *Huffman v. Chicago, etc., R. Co.*, 78 Mo. 50 ; s. c., 17 Am. & Eng. R. R. Cas. 625.

It is believed that *Baulec v. New York & H. R. Co.*, 59 N. Y. 356, contains a statement of the correct rule: "When, as here, the general fitness and capacity of a servant is involved, the prior acts and conduct of such servant on specific occasions may be given in evidence, with proof that the principal had knowledge of such acts. The cases in which evidence of other acts of misconduct or neglect, of servants or employees whose acts and omissions of duty are the subject of investigation, have been held incompetent, have been those in which it has been sought to prove a culpable neglect of duty on a particular occasion by showing similar acts of negligence on other occasions. This class of cases does not bear upon the case in hand, and may be laid out of view. Proof of specific acts of negligence of a servant or agent on one or more occasions does not tend to prove negligence on the particular occasion which is the subject of inquiry. Where character, as distinguished from reputation, is the subject of investigation, specific acts tend to exhibit and bring to light the peculiar qualities of the man, and indicate his adaptation, or want of adaptation, to any position, or fitness or unfitness for a particular duty or trust. It is by many or by a series of acts that individuals acquire a general reputation, and by which their characters are known and described; and the actual qualities, the true characteristics, of individuals—those qualities and characteristics which would or should influence and control in the selection of agents for positions of trust and responsibility,—are learned and known. A principal would be without excuse should he employ for a responsible position, on the proper performance of the duties of which the lives of others might depend, one known to him as having the reputation of being an intemperate, imprudent, indolent, or careless man. He would be held liable to the fellow-servants of the employee for any injury resulting from the deficiencies and defects imputed to the individual by public opinion and general report. Still more would he be chargeable if he had knowledge of specific acts showing that he possessed characteristics incompatible with the duties assigned him, and which might expose his fellow-servants and others to peril and harm . . . An individual who by years of faithful service has shown himself trustworthy, vigilant, and competent, is not disqualified for further employment and proved either incompetent, or careless and not trustworthy, by a single mistake or act of forgetfulness and omission to exercise the highest degree of caution and presence of mind. The fact would only show, what must be true of every human being, that the individual was capable of an act of negligence, forgetfulness, or error of judgment. This must be the case as to all employees of corporations until a race of servants can be found free from the defects and infirmities of humanity. A single act may, under some circumstances, show an individual to be an improper and unfit person for a position of trust or any particular service; as, when such act is intentional, and done wantonly, regardless of consequences, or maliciously. So the manner in which a specific act is performed may conclusively show the utter incompetency of the actor, and his inability to perform a particular service. But a sin-

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gle act of casual neglect does not, *per se*, tend to prove the party to be careless and imprudent, and unfitted for a position requiring care and prudence. Character is formed and qualities exhibited by a series of acts, and not by a single act. An engineer might from inattention omit to sound the whistle or ring the bell at a road-crossing, but such fact would not tend to prove him a careless and negligent servant of the company. The company is only charged with the duty of employing those who have acquired a good character in respect to the qualifications called for by the particular service; and no one would say that a good character acquired by long service was destroyed or seriously impaired by a single involuntary and unintentional fault. *Murphy v. Pollock*, 15 Ir. C. L. 224. But this appeal does not necessarily depend upon the correctness of this view of the effect to be given to a single instance of neglect. All that the corporation defendant was bound to do, after the occurrence, was to inquire into and ascertain the facts, and act in the discharge or retention of the switchman, with reference to the facts as ascertained, as reasonable prudence and care would dictate; and if such care and caution were exercised, the company is not liable, although its general agent erred in judgment in retaining the switchman in the same service. Ordinary care and reasonable exercise of discretion and judgment is all that is necessary to absolve the corporation from the charge of neglect of duty in such a case."

Incompetency of Fellow Servants—Knowledge of Master.—Evidence of general reputation is admissible to prove the unfitness of a fellow servant, and ignorance of such general reputation on the part of the master is itself negligence in a case in which proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative. *Davis v. Detroit & Mil. R. Co.*, 20 Mich. 105; see also *Summersell v. Fish*, 117 Mass. 312; *Gilman v. Eastern R. Co.* 13 Allen (Mass.) 433; *Hatt v. Nay*, 144 Mass. 186; *Tarrant v. Webb*, 18 C. B. 797; *Edwards v. Railroad*, 4 C. & F. 530; *Mad River R. Co. v. Barber*, 5 Ohio St. 541; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 557.

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HUNTER

v.

KANSAS CITY & M. RAILWAY & BRIDGE CO.

(Circuit Court of Appeals, Sixth Circuit, Feb. 8, 1898.)

Injury to Employee—Fellow Servants or Vice-Principals—Burden of Proof.*—Under the law of Arkansas, it is to be presumed that persons working together to a common purpose in the same department are fellow servants, and the burden is upon him who claims that a different relation existed between them to establish that one was a vice-principal; and such burden was not sustained by evidence to the effect that an associate was not a “boss”, and was given no authority to control his associates in the work of erecting poles near defendant’s track, but that to him was intrusted the use of the level and gauge for the purpose of aiding in the adjustment of the poles.

Same—Negligence—Proximate Cause.—And even had such an associate been a vice-principal, the railroad company would not be liable, defendant having alleged that his injury was the result of negligence on the part of such associate and the evidence showing that it was caused by the condition of the ground upon which they had to work, the associate alleged to have been acting as vice-principal having slipped while holding in position a pole which fell upon and injured plaintiff.

ERROR by plaintiff from the Circuit Court of the United States for the Western District of Tennessee.
Affirmed.

This was an action commenced in the circuit court of Shelby county, Tenn., by the plaintiff in error, a citizen of Tennessee, against defendant in error, a corporation existing under the law of Arkansas, and removed, upon the ground of diversity of citizenship, by the defendant, into the circuit court of the United States. The suit was brought for the purpose of recovering damages for a personal injury resulting to plaintiff when in the service of the defendant, from an alleged negligent act of one Robert Snowden, who it is alleged stood at the time in the relation of a

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*See note at end of case.

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vice principal to the plaintiff. The injury occurred in the state of Arkansas, and the case largely turned below upon the question as to whether said Robert Snowden was in fact a vice principal or a fellow servant under a statute of the state of Arkansas passed in 1893. At the conclusion of all the evidence the court instructed for the defendant upon the ground that Snowden was not a vice principal, but a fellow servant with plaintiff. The evidence relating to this subject was substantially as follows:

The plaintiff testified in his own behalf that he was a laborer in the employment of the railroad company, and engaged, in company with Bob Snowden, a white mechanic, and Jim Dowd, a negro, in setting posts alongside the railroad track; that he was down in the bottom of a wide post hole, and that the other two men were on the ground on top, letting the post down into the hole; that they had a wire bridle around the post, with a stick through it, one man at each end; that he was down in the hole directing the descent, with the post hugged in his arms; that suddenly the men above appeared to turn the post loose, and the post rapidly descended, and pulled him downward, wrenching his back. Plaintiff did not see the cause of the sudden fall of the post, as he was down in the hole and not looking up. He testified that there were four men in his gang, himself and two other colored men, one named Dowd and the other Taylor, and a white man by the name of Snowden, whom he calls "the boss of the gang." When asked about the services being rendered by Snowden, the witness said that Snowden was a mechanic; that he measured the distance the top of each post was to stand from the rail of the track, and plumbed it with a spirit level, to bring the top of the post to a level with the rail. He said: "We would move the post anyway he said move it, and, after we got it plumb, would throw dirt around it, and another gang came on behind us and filled the hole up." The witness also said that Taylor and Dowd had theretofore been engaged in lowering the posts to plaintiff, but that, before the particular

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post in question was lowered, Snowden told Taylor to deepen one of the adjacent holes, and himself undertook, with Dowd, to lower the post that plaintiff was guiding. He describes Taylor as a large and strong man physically, and Snowden as a small and weak man, though plaintiff does not undertake to say what was the cause of the slipping of the post in this particular instance. Plaintiff says that he was receiving the wages of a common laborer, \$1.25 per day, and that Mr. Snowden was a carpenter and mechanic, and received \$2.50 per day; and that another carpenter by the name of Guth had theretofore been engaged in doing the work which Snowden was doing upon the day in question, but that Guth had been sent away by the "boss" to do work in another place, and Mr. Snowden on the day in question took his place. The plaintiff was employed by a Mr. Hanna, who was the engineer in charge of the work, Mr. Green being what he called "general boss of the post-setting business." This injury occurred on the 21st of April, 1893, and plaintiff's suit was begun more than twelve months thereafter.

J. J. Guth testified for the plaintiff, that he was a carpenter and mechanic, and was employed in setting posts in holes alongside of the railroad. He said that Mr. Snowden was doing some carpenter work for the company, and that Mr. Green, "the boss," took witness away, and put Mr. Snowden in his place, assigning witness to work at another point. The witness was asked to state the kind of work he was doing in connection with the plaintiff and the other members of the plaintiff's gang at the time he was relieved by Snowden. He said he was employed by Mr. Hanna, the engineer in charge of the work, and that Mr. Green, "the boss," "told me he wanted me to come down with him to show him how to put down those posts for the rack machine. He told me he was going to give me these men to dig the holes, and he gave me the gauge from the rail to the post and at the same time a level. It had to be exactly level. When I put my gauge on the rail and on the post, it had to be level. He gave me these men,

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some of them to dig holes, and some of them to help me plumb and set the posts. I stayed there until he wanted me to come * * * and help Mr. Green on the wires." He said: "They dug the holes and I set the posts with them. Q. They dug the holes and you helped set the posts? A. Yes, sir; I laid the holes off for them and they set the posts; of course they were helping me. Q. What did you do towards setting the posts? A. I leveled them and plumbed them. Q. When you would level them what would these men do? A. Some of them generally went down in the hole. I had to gauge the post above, and they would move it below so as to get it plumb. After they had it plumb, they threw the dirt around it and jambed it down. Q. Now, you said you had them to move the posts? A. Yes, sir. Q. How and in what manner did you have them to move the posts? A. One of them went down, and I had what we call a 'bridle' made. I put the bridle on the post, and held the post up while the man below was moving the post. Q. You say you held the post. Did you hold it or did these men hold it? A. I held the post, and had another man to help me. I always took hold myself. Q. You had to do that in order to plumb it and level it, did you? When you went to plumb it and level it, it was necessary to do that. Was that a necessary part of it? A. No sir. When the post wasn't setting right we had to take it out occasionally and dig the hole deeper, and I had a man down there in the hole to move it until we got it right. Q. Could you plumb it and set it without taking hold of it yourself? A. No; I raised it up myself generally. I raised that post up myself most of the time, and had a man down in the hole setting it below for me. Q. In setting those posts who was the judge of how the post was set or ought to be set? A. I had to tell them, of course. Q. Who was responsible for the proper setting of those posts? A. Mr. Green looked to me, of course. Q. Did he look to any of those men that you said he had given you? A. Oh, no, sir. Q. You worked the level and the gauge, did you? A. Yes, sir."

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The witness, Jim Dowd, one of the men at work with plaintiff, testified that he was hired by Mr. Green, "the boss;" that on the day in question Mr. Snowden took Mr. Guth's place, and was helping to set posts; that they were to set posts with Henry Taylor and Hunter. The witness said that "Mr. Snowden sent Taylor back down to dig out another hole deeper before we got to it where we were setting those posts out there, and Mr. Snowden and I were letting this post down in the hole, and Hunter was placing the post down in there. It was slippery around there, and Mr. Snowden slipped, and gave way, and the post fell into the hole. It was within about three or four feet of the bottom, and he slipped and it fell into the hole. Hunter was down in the hole,—had the post in his arms. Mr. Snowden and I had hold of the bridle,—a wire on a rod three feet long. Q. You say Snowden fell in the hole? A. No, sir; didn't fall in the hole. He slipped, and, to keep from falling in the hole, he gave way on the post, and that made the post have a sort of fall over towards Mr. Snowden, where he was standing." Witness was asked: "Q. Who was directing you? Was anybody directing you over there? A. Mr. Snowden was supposed to be our boss there at that time, because they told us anything he told us to do, to do it."

Robert Snowden was also examined as a witness for the plaintiff. He testified that he was a carpenter by trade; had been employed by the railroad company to put in some lock switches; that he was employed by Mr. Hanna, the engineer of the company. "Q. Who was the foreman over there? A. Mr. Green. Q. He was in charge of the work? A. Yes, sir. Q. Did you have any authority to employ or discharge men? A. None whatever. Q. Did you have any control over or right to direct the men who were working with you? A. No, sir; Mr. Green would just say, 'Do this here,' and the men would go together. I had no control over them. I was just the same as any other hireling. By the court: Q. You say you were not a foreman and had no right to direct them or give orders? A. No sir,

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not personally. As far as directing them I was, in one way; he would send me to do a piece of work supposed to be a mechanic's work, and he would send a couple of men if I needed help. By the court: Q. To help you? A. Yes, sir; to help me. Of course I would do what was wanted done, and my laborers would help me. Q. You were not what was called a foreman? A. No, sir; I was no foreman at all. Q. Just hired for wages like the other men? A. Yes, sir; hired for wages like the other men. Q. What part of the work did you do about setting those posts? A. I had a gange. The posts had to be set a foot in height, and a certain space to line them up beside the railroad track. It was my part to take and set those posts, as I said, a certain height and a certain space from the track. I used my level and a straightedge. That was my part of the work. Q. When you all were sent off to do this work of setting those posts, were those darkies under your direction? A. They were there doing the laborer's work. Q. As directed by you? A. To set the post where I told them to put them out. Q. Where you told them to put the posts they did so? A. Yes, sir? Q. And whenever you saw fit to send away or to send them to other parts of the work, they did that. A. I had no right to send them away. Q. You were to measure and direct how it was to be done? A. That was my portion of the work. Q. And these men were to do it according to your direction? A. Of course, to lift the posts and set them in proper shape. Q. And it ordinarily took three men? A. One in the hole and two outside with the sling." The witness testified, further, that he had no recollection of having sent Taylor away on the day he assisted in setting those posts, or having himself personally undertaken to lower any posts into holes, or that he had ever heard the plaintiff complain of having received any injury while working with him at that business. He said he would not positively say that he had not upon a particular day or instance taken hold of a post himself, in the absence of one of the men but he had no recollection of it, and none of the plain-

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tiff having been injured while aiding in the setting of any posts.

A. B. Pittman, for plaintiff in error.

Adams, Trimble, and Pratt (*Wallace Pratt*, of counsel), for appellee.

Before LURTON, Circuit Judge, and SEVERENS, District Judge.

LURTON, Circuit Judge, after making the foregoing statement, of facts, delivered the opinion of the court.

The learned counsel for the plaintiff in error concede that at common law Hunter and Snowden were fellow servants, but say that under the Arkansas statute defining that relation he was a vice principal. The Arkansas statute is as follows:

“All persons engaged in the service of any railway corporations, foreign or domestic, doing business in this state, who are intrusted by such corporation with the authority of superintendence, control or command of other persons in the employ or service of such corporation, or with the authority to direct any other employee, in the performance of any duty of such employee, are vice-principals of such corporation, and are not fellow servants with such employee.

“All persons who are engaged in the common service of such railway corporations, and who, while so engaged, are working together to a common purpose, of same grade, neither of such persons being intrusted by such corporations with any superintendence or control over their fellow employees, are fellow servants with each other; provided, nothing herein contained shall be so construed as to make employees of such corporation in the service of such corporation, fellow servants with other employees of such corporation in any other department or service of such corporation. Employees who do not come within the provisions of this section shall not be considered fellow servants.” Sand. & H. Dig. § § 6248. 6249.

Such statutes do not encroach upon Federal author-

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ity, and constitute the law of the state which federal courts are bound to administer in suits arising within the state. *Pierce v. Van Dusen*, 24 C. C. A. 280, 78 Fed. 693.

We have, under this evidence, the case of three men working together in the common purpose of setting a post in a hole prepared to receive it. That Snowden received larger pay than Hunter, or that in some respects his work was not the same as that done by his associates, does not determine that he was a vice principal. The determining question under this statute is whether he was intrusted by the corporation with the authority of superintendence, control, or command of those with whom he was associated in the service of the company, or with authority to direct these other employes in the performance of their duty to the common master. When as in this case, it is shown that several persons are associated together and working together to a common purpose in the same department, they are presumed, under the second section of the Arkansas statute, to be fellow servants, and the burden is upon him who claims that a different relation existed to establish that one was a vice principal. Thus, in *Railway Co. v. Becker*, 63 Ark. 477, 39 S. W. 358, a fireman was injured by the negligence of his engineer. Though their duties were different, yet proof that they were in the same department and working together to a common purpose was held, under the second section of this act, to raise a presumption that they were fellow servants. That Hunter should regard Snowden as a "boss," or that he assumed to have some sort of control over those associated with him, will not make him the representative of the corporation. The authority to control and direct others must be an authority "intrusted by such corporation" to him. His authority may, of course, be implied from the very nature of the duties imposed upon him; but he is not a vice principal merely because his higher character, greater intelligence, superior race, or natural habit of command

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caused him to assume an authority not intrusted to him by the common master, or to be regarded and treated with a respect due to his personal qualities, rather than to his delegated power of control, by those associated with him. Snowden was a carpenter. He was a white man. His associates were colored men and ordinary laborers. His work, in some respects, differed from that to be done by those co-operating with him. One Hanna was engineer in general charge, and hired all the men. One Green was the "boss,"—"the general boss," as the plaintiff calls him, in order to make place for a subboss.

In overruling a motion for a new trial, JUDGE HAMMOND very clearly stated the effect of the evidence touching the alleged control of Snowden over his associates:

"He was a white man; and wherever two or three negro laborers are gathered together, and there is a white man engaged with them, he is naturally considered the 'boss,' and just as naturally takes certain control and direction of things. But I take it that nothing is to be implied from this condition as extending his authority to 'direct any other employe in the performance of any duty of such employe,' to use the language of the Arkansas statute. We must determine that authority of which the statute speaks as necessary to make a vice principal as arising from the common master himself,—in this case the bridge company,—and we must determine its nature and the limitations upon it with reference to the instructions that have been given by the master or the employment about which the servant is engaged. I hold that, on all the proof in this case, no reasonable inference can be drawn that any other authority or direction was given to Snowden than that of gauging and leveling the posts, and in the doing of this he was a co-laborer and fellow servant of the other three or five 'working together to a common purpose, of same grade,' neither of the four or six, as the case may be, being intrusted with any superintendence or control over their fellow

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employees, thus falling directly within the definition of fellow servant as given by the second section of the Arkansas statute. It is within the statutory description of a fellow servant contained in the second section of the statute that this case falls, and not within the first section, according to my judgment. The mere fact that this common carpenter, using the gauge and level, should in their use have occasion to 'direct' that his fellow laborers should elevate or lower a post or should move it a few inches, more or less, nearer or further from the line of the track, did not vest him with such 'authority to direct' as was contemplated by the first section of this act, any more than would be the case if one of the other three were to throw a few spadefuls more or less, of earth into the hole, or to use more or less strokes of the rammer in tamping the earth around the post or any other common direction like that. If Snowden should, in adjusting his gauge or using his level, have committed some error of judgment which was detected by one of the other three co-laborers, and he should say to Snowden, 'Put your level here,' or 'Your gauge here,' he would be in as much authority to give directions about the common work as Snowden would ; and it is not such natural, incidental, and necessary 'direction' and 'control' as must occur whenever two or more work together to which this statute refers, but that kind of master-like command which involved the element of superior will and authority far more than Snowden had in this case.

Snowden testified that he was not a "boss," and was given no authority to command or control his associates. To him was intrusted the use of the level and the guage, for the purpose of aiding in the proper alignment and adjustment of the posts which were being set by the co-operation of all. His directions to deepen a hole, or to move a post to the right or to the left, or to lower or to raise it, were more in the nature of the signals which a swich-tender or brakeman might give to a conductor or engineer to guide them in the move-

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ment of a train, than of commands given in the exercise of the authority of a superior over an inferior.

In *Railway Co. v. Ranney*, 37 Ohio St. 665-671, a case decided before the Ohio statute defining fellow servants, a question arose which involved the question as to whether an engineer, who gave signals by whistle to the brakeman to put on and release the brakes, thereby exercised a control and authority over such brakemen, that, under the decisions of Ohio, being the test as to whether the relation of vice principal existed. JUDGE MCILVANE, a great judge, in respect to this question said :

"It is contended that these signals are in the nature of orders or commands, which the engineer is authorized to give to brakemen, which they are bound to obey, and hence the relation as superior and subordinate is created. A majority of the court do not so understand either the purpose or effect of the rule. These signals are so named properly, and are intended to notify all concerned of the things signified. They are addressed to the conductor as well as brakemen, and it is the duty of the conductor to see that brakemen perform the duty signified. This duty is imposed upon the brakemen by force of the rule itself, and not by virtue of any authority vested in the engineer over the brakemen. The signal is a mere notice. The rule is the order of the company to the brakeman directly. Suppose a train is signaled by a station agent, as this train was, to stop for orders. It thereby became the duty of the conductor, as well as of each employee on the train, to stop for orders; and yet no one can contend that such station agent, who gives the signal, is the superior and the train crew subordinate employees of the company, within the meaning of the rule under consideration. A variety of signals, under a variety of circumstances, are required to be given by different employees of the company, to signify that an occasion exists for the performance of a particular duty; but it would be absurd to hold that, in each case, the employee giving the signal is a superior servant, to whom all others,

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to whom information is thus communicated, are subordinated, so that the company would be responsible to them for any act of negligence of the employee who gave the signal, whether such negligence was in giving the signal or in the performance of other duties."

In *Railroad Co. v. Camp*, 31 U. S. App. 213, 231, 232, 13 C. C. A. 233, and 65 Fed. 952, this court held that a telegraph operator was not a vice principal under the Ohio fellow servant statute, which is substantially identical with the Arkansas statute under consideration. In speaking for the court, JUDGE TAFT said:

"In our opinion, the telegraph operator has neither power nor authority to direct or control the engineer. He is only the medium through whom orders from the train dispatcher are communicated to the engineer and the conductor. He gives notice to the engineer and the conductor. He gives notice to the engineer of certain facts from which the duty of the engineer arises under the rules of the company. The conductor is in control of the train, and the engineer and the brakemen are his subordinates. Suppose that the conductor sends an order to the engineer by the brakemen; does the brakeman thereby become a person actually having power or authority to direct or control the engineer? Clearly not. The duty of the switchman in such a case is merely to give notice to the engineer of the condition of affairs upon which the engineer is required to act. And so the engineer's duty to act upon the signal from the telegraph operator does not come from any authority or power to control reposed in the telegraph operator. The authority or control is in the train dispatcher, who gives the order, not in the mere transmitter of it. When there is no order, but the telegraph operator conveys by signals to the engineer information as to the position of other trains or the condition of the track ahead, the operator is the mere register of the fact, a mere notifier, a mere giver of information upon which the engineer, under the rules of the company, at once knows his duty and acts accordingly."

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The particular duty of Snowden was to use his level and gauge and announce the result. If the hole was too deep or too shallow, or the post not plumb, the fact was thereby ascertained, and it became his duty and that of his associates to do what was necessary to bring it into proper relation by deepening or filling or by other movement of the post indicated by the level and gauge. There was no sufficient evidence to overcome the presumption that the relation of fellow servant existed under the construction placed upon the second section of the Arkansas act by the supreme court of that state and the jury were properly instructed, on this ground, to find for the defendant. If, however,

it be conceded that Snowden was a vice principal, there was no evidence upon which a jury could reasonably find that he had been guilty of any negligence. Waiving the question as to whether, when engaged in co-operation with Hunter and Dowd in handling this post, he was then in the exercise of any superintendence or control as such vice principal, the evidence is that the ground immediately around the top of the hole into which the post was to be set, and where Snowden and Dowd in lowering the post were necessarily required to stand, was slippery. Dowd is the only witness who speaks upon the question as to how the post came to slip and fall upon Hunter, and he says that Snowden while engaged with him in lowering the post to Hunter slipped, and thereby lost his hold upon the post. The slippery character of the place where he stood and the kind of work he was engaged in accounts for the accident. He slipped because his work had to be done on a slippery place, and he lost his hold on the heavy post because of this slip. The declaration charges that Snowden "negligently, carelessly, and wantonly released his hold upon said post, thereby causing it to be precipitated with great force" against the plaintiff, etc. Now, there is no evidence to support this averment, for it is thus shown that he slipped from the slippery character of the ground on which he was obliged to stand while

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lowering the post. That his slipping was due to any carelessness in placing his feet, or in holding the post, is not shown. The absence of due care is not to be inferred from these facts. The burden of proof was upon the plaintiff to establish the want of due care, and this burden was not shifted by evidence that Snowden slipped, and thereby lost his hold; the slipping being explained by the evidence as to the character of the ground on which he was standing and of the work he was engaged in. "Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." *Blyth v. Waterworks Co.*, 11 Exch. 784. There is no evidence that all the precautions necessary to the seeming exigencies of the situation were not observed to avoid hurt to others. The injury was clearly accidental. *Brown v. Kendall*, 6 Cush. 295; *Harvey v. Dunlop*, Lalor, Supp. 193; *The Nitro-Glycerine Case*, 15 Wall. 524. The suggestion that the sending of Taylor away and the doing of his work by Snowden, a smaller and weaker man, was the cause of the accident, does not meet the case. That the slip was due to any want of strength is not shown by any fact in the case, and, if it were, the suggested cause is too remote. Sending Taylor away was not the proximate cause of the injury, but the slipping of Snowden, due to the slippery character of the ground, an accident which might as well have happened to Taylor as another. *Hoag v. Railroad Co.*, 85 Pa. St. 293.

The question as to whether the defendant, as a foreign corporation, having an agency and doing business within the state, was nevertheless "absent from" "or out of the state," when this action accrued under section 3458, Code Mill. & V. Tenn., so as to deprive it of the benefit of the Tennessee statute of limitations, was involved, and has been ably argued. The question has not been determined by the supreme court of Tennessee, and we have not found it necessary to decide it

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here inasmuch as the judgment must be affirmed upon the grounds already considered.

NOTE.

Vice-Principals—Burden of Proof.—The burden of proof is on the plaintiff to show that a co-employee of a common master is a superior and not a fellow servant, unless the nature of the employment shows the extent of the co-employee's powers. *Patton v. Western N. C. R. Co.*, 31 Am. & Eng. R. Cas. 298, 96 N. Car. 455.

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(Supreme Court of Arkansas, March 12, 1898.)

Injuries to Employee—Boarding Moving Car—Negligence of Fellow Servant*—Assumption of Risk.—A railroad employee who attempts to board a car which is moving round on a turntable, or when he is chargeable with notice that it is about to move, assumes the risk, whether he is injured through his own want of ordinary care, or the act of a fellow servant in striking his arms; and the fact that it is the custom of the company to pay off its employees on such car while it is on the turntable is immaterial, the employee being aware that he could receive his pay after the car left the turntable and before it left the station.

APPEAL by defendant from Miller county, circuit court. *Reversed and dismissed.*

Dodge & Johnson, for appellant.

Scott & Jones, for appellee.

HUGHES, J. The appellee was an employee in the car department of the appellant, at Texarkana, Ark., and was injured by having his foot mashed between the rail of a turntable and the rail of the railway, as he was attempting to board a pay car, which had been placed on the turntable preparatory to being turned

*See notes at end of case.

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and resuming its way north on the railroad track. The appellee charges in his complaint that he was injured through the negligence of the appellant in failing to have a safe place in which to pay its employees; that he was invited by the appellant to go upon the pay car, while on the turntable, to receive his pay; and that while attempting to go upon the car he seized the railings on each side of the car, and that as he put his foot on a step, for the purpose of going upon the car, some one of the employees going on or off the car struck his arm, and broke his hold upon the step, and as he stepped back his foot was caught between the rail of the turntable and severely mashed, etc. The answer of the appellant denied negligence, charged that plaintiff assumed the risk of injury in going upon the car, and that he was guilty of contributory negligence. Verdict and judgment for appellee, and appeal to this court by appellant. The evidence shows that the employees were being paid off, on the pay car, while it was on the turntable, and that this had been customary; that the appellee had been in the service of the railway company at Texarkana for 15 months before the accident, and that he was a man 49 years of age, and was experienced, and familiar with the custom of paying employees in that way, and had been for 15 months; that he had gone there to be paid, being directed to do so by his foreman; that there were many employees crowding on and off the car to receive their pay as their names were called, which was customary. When the appellee's name was called, he made an attempt to go upon the pay car by seizing the railings, and that at the time there were persons on the platform hurrying off, and, by some one striking his arm, his hold upon the railings was broken, which caused him to step back, and as he did so his foot was caught and mashed between the rail of the turntable and the rail of the track. The turntable was moving slowly at the time his foot was caught, and, if not moving at the time he started to go upon the car, it was at that instant about to move round, and it appears that the

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appellee understood this. The proof tends to show that the car was moving, as he first attempted to board it. If he had used ordinary care, he would have known this, and he is chargeable with knowledge of it. The danger of attempting to board the car, under the circumstances, if there was any, was such that one using ordinary care could have known; and as it appears that the appellee, knowing the turntable was moving, or that it was just about to move, at the time he first started to make the attempt to board it, he assumed the risk of injury from such attempt. It is not apparent that there was any negligence upon the part of the railway company, and, if he was injured through the negligence of any one, it was either through his own want of ordinary care, or the act of a fellow servant, in striking his arms and breaking his hold upon the railings. In either event the company was not liable. He was not impelled to attempt to go upon the car, while on the turntable, by the fear of any penalty for failure to do so, or fear of the loss of any right, as the evidence shows he could and would have been paid elsewhere before the car left Texarkana. Reversed and dismissed.

NOTES.

Masters Exemption from Liability for Servant's Torts to Fellow Servants, see exhaustive note 22 Am. & Eng. R. Cas. 319; see also notes 17 Id. 688 *et seq*; and 21 Id. 514.

Employees as Passengers While on Paying Cars.—An employee on a train by invitation to receive his wages is in the position of a passenger, and the company must exercise the same degree of care for his safety as if he were such. *Louisville & N. R. Co. v. Staker*, 86 Tenn. 343, 6 Am. St. Rep. 840, 6 S. W. Rep. 737.

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v.

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(*Supreme Court of Errors of Connecticut, Jan. 5, 1898.*)

Appeal—Questions of Fact—Review.—The superior court is the court of last resort for the adjudication of facts.

Same—Questions of Law—Review.—But where the record embraces all the findings of fact, an erroneous conclusion of law therefrom of the trial court, to which error has been properly assigned, is subject to review by the supreme court of errors.

Same—Same—Same.—The judgment or ultimate conclusion of a court upon the special facts in issue, as ascertained from the evidence and settled by the trial, is a conclusion of law, and, as such reviewable by the supreme court of errors.

Collision—Injury to Employee—Conclusion of Law.—A conclusion of the trial court from the material facts, all of which were found, that the collision in which plaintiff's intestate was injured was the result of the combined negligence of defendant and a fellow employee of plaintiff's intestate, was a conclusion of law, and reviewable by the supreme court of errors.

Same—Same—Rules—Sufficiency.*—The rules of the defendant railroad company were substantially the same as those of about 90 per cent. of the railroad companies of the United States; and the trial court found that they were the best that had been devised by the railroad talent of the country. *Held*, that it was error to find that defendant failed to exercise proper supervision of the running of the trains which collided, merely upon the ground that such rules did not require that those in charge of trains moving in the same direction should be informed by telegraph as to their relative position.

Same—Same—Same.—The trial court found that the forward train of two trains moving in the same direction was more than an hour behind schedule time, and had stopped to attach freight cars at a siding where freight trains stopped occasionally and at irregular intervals; that the rear train consisted of an engine pushing a snow plow, the snow from which occasionally obstructed the view and moved at a faster rate of speed than the forward train. *Held*, that such conditions did not constitute an emergency unprovided for by defendant's rules; and did not throw upon its train dispatcher the duty of keeping the conductors on such trains informed by telegraph of their relative position.

Negligence—Question of Law—Review.—The finding, in substance, of the trial court from all the facts found that defendant

*See note at end of case.

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was guilty of negligence, was a determination of a question of law, and reviewable.

Negligence of Fellow Servant—Liability.—A railroad corporation is not liable for the death of its employee resulting from the negligence of a fellow employee.

APPEAL by defendant from Fairfield county superior court. *Reversed.*

The facts on which liability is claimed are as follows:
“Third. On the 12th day of March, A. D. 1896, the defendant, by itself, its servants and agents, was operating and running in a southerly direction on said railroad a train of freight cars, and was operating and running on said railroad, in the rear of and following said freight train, a train which consisted of a snow plow and a locomotive, the locomotive being behind the snow plow, and pushing it forward, and then, and while so operating said trains, negligently conducted itself in the management and equipment of said trains by failing to give proper telegraphic information to the conductor and engineer of each of such trains relative to the position of the other of said trains; by failing to give proper orders to the conductor and engineer of each of said trains; by running the said rear or snow plow train at a high and dangerous rate of speed; by failing, when the said freight train, as hereinafter stated, was left standing upon the main track, to give sufficient and timely signal and warning to the approaching aforesaid snow plow train; by failing to have upon the said freight train a sufficient number of men to both do the freighting work required of the train crew and to also guard against collision; by failing to have sufficient and serviceable brakes upon the snow plow and locomotive composing the snow plow train; by using and putting into said snow plow train a plow so high and improperly constructed that it obstructed the engineer's view of the tracks in dangerous places on said railroad, and while approaching the place where the collision hereinafter stated occurred; by having in the said snow plow only such windows as were too small and inconveniently placed to serve properly for lookout

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purposes; by failing to have a proper, certain, and speedy means of signaling from the snow plow to the engineer of the locomotive; by failing to exercise proper supervision of the running of said trains, so that the said snow-plow train collided with the said freight train at a place on said railroad in the town of Kent, near the Kent Furnace switch and as a result of such collision the plaintiff's intestate, Jerry Nolan, received severe injuries, which injuries were aggravated by exposure and rough treatment, made necessary by the negligence of the defendant in failing to have upon the said snow-plow train a hospital stretcher, as the law required. In consequence of the aforesaid injuries, the said Jerry Nolan died. Fourth. At the time of the said collision, the said freight train, with the exception of the locomotive, was standing upon the main track, near the Kent Furnace switch, in the town of Kent,—the same track upon which the snow-plow train was approaching. The locomotive of the freight train had been detached, and was working on a side track. The said snow-plow train, coming at a terrific rate of speed, crashed into the rear end of the freight train. The said Jerry Nolan was rightfully within said snow plow, which by force of the collision, was crushed in upon him, inflicting severe injuries."

The facts on which the judgment is founded are found as follows: "(1) On March 12, 1896, the defendant was a duly-organized corporation under the laws of the state of Connecticut, and was operating its single-track road with sidings and switches extending from the city of Bridgeport, in the state of Connecticut, to the city of Pittsfield, in the state of Massachusetts, and forming a part of what is known as the 'Berkshire Division' of the defendant. (2) At all of the regular stopping places for trains, with three exceptions, the defendant maintains a telegraph office, and the departure of all trains from stations having a telegraph office is at once telegraphed to New Haven, to the train dispatcher. (3) At all of the regular stopping places for trains, with three exceptions, the de-

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defendant maintains a time board, upon which the station agent places in large figures the time of departure of each train from these stations. The time board apprises the conductor and engineer of each train of the time of departure of the train last at the station, and going in the same direction, and these officials rely upon such information in regard to the position of trains in advance, in the absence of special order. (4) The movement of all trains upon this division was in the exclusive control of the train dispatcher at New Haven. Conductors and engineers and all officials are bound to obey his orders. He acted in the name, by the authority, and in the place, of the defendant. (5) The division superintendent ordered trains to run, and the train dispatcher gave the running orders by telegraph. (6) The train dispatcher had at all times the location of every train, regular and extra, running upon this division, as they passed the telegraphic stations, and knew at what stations or places each train was to stop, and about the length of time it would be required to stop. (7) Whenever special orders to control the movements of trains are necessary, the train dispatcher at New Haven sends such orders by telegraph to the operator located at a station which such train is approaching, and the operator hands a copy of said order to the conductor and a copy to the engineer of said train. (8) On said day the regular way freight known as '1411', and so designated hereafter in this finding, started from Great Barrington at 5:30 a. m. It gradually fell behind its schedule time, and at Falls Village was considerably late. Freight trains are often late, and every one connected with the operation and movement of defendant's trains knew this. (9) At Great Barrington the conductor received an order from the division superintendent to stop at Kent Furnace, and attach to 1411 three freight cars on siding there. (10) Kent Furnace is between North Kent and Kent, and is nothing but a railroad siding, where freight trains occasionally stop, but only upon orders from the division superintendent. There is no station, no

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station agent, no telegraph, or time board there. There are only two other places on this division where freight trains stop similar to this place, *viz.*, Trumbull Ice Pond and South Glendale. Kent Furnace is an unusual stopping place, not named upon the official time table in use by defendant's employees. (11) Freight 1411 ran at the rate of from twenty to twenty-five miles an hour,—the usual speed of freight trains,—and when it left Cornwall Bridge at 10:28 a. m., its last stopping place, and the last station at which telegraphic orders could have been issued to it, it was one hour and eighteen minutes behind its regular schedule time. (12) The only station between Cornwall Bridge and Kent is North Kent, where they have no telegraph, and where 1411 was not required to stop, and did not stop, on this day. (13) Kent Furnace is about seven miles and Kent about eight and one-half miles from Cornwall Bridge. (14) Freight 1411 reached Kent Furnace about 10:50 a. m., and while the train remained on the main track the engine began the work of getting the three freight cars from the siding to the main track. (15) The usual running time for the freight train between Cornwall Bridge and Kent Furnace, where no stop is made at North Kent, is twenty-one minutes, and the usual stopping time to do the work at Kent Furnace is fifteen minutes. (16) The work at Kent Furnace on this morning would have taken the usual stopping time, fifteen minutes. (17) Between 5:30 and 6 a. m. an extra train, known as '474', and hereafter in this finding so designated, consisting of a snow plow, locomotive and tender, the snow plow being ahead of the locomotive and tender, and pushed by the locomotive, left Pittsfield, for the purpose of clearing the track of the defendant of snow. (18) Train 474 ran at about forty miles an hour, and steadily gained on 1411. In order that 474 should do effective work, it was necessary that it run between thirty-five and forty miles an hour. (19) Train 474 received telegraphic orders at Falls Village to run extra to New Milford. New Milford is the fourth

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station below Kent. This gave 474 the right of the track to New Milford, keeping ten minutes off the time of all regular trains. Thereafter train 474 ran under this order, which was in accordance with the rules. When 474 reached a station, and the time board showed that the last train at the station departed ten minutes or more before, 474 might continue its run, in the absence of special order. (20) Train 474 passed Cornwall Bridge at 10:52 a. m., twenty-four minutes behind freight 1411, under the order recited in paragraph 19, *supra*. (21) Train 474 knew freight 1411 had passed Cornwall Bridge at 10:28. (22) Train 474, under the rules of defendant, had the right to proceed, and under the order recited in paragraph 19 was bound to proceed, and did so, running at the rate of forty-two miles an hour. (23) No one on board of train 474 knew that 1411 had received orders to stop at Kent Furnace. The conductor in charge and the engineer knew, from the order, that 474 had the right of track to New Milford. (24) No one in charge of or on 1411 knew officially that 474 was in the rear. The conductor and rear brakeman had heard the night before that 474 would be out in the morning, but had no information that 474 was in fact out. No one on 1411 knew the location of 474 at any time on said day. The conductor of 1411 had cautioned Rear Brakeman Hall, at West Cornwall, the station just north of Cornwall Bridge, to look out for 474, but gave him no further caution or order. (25) No order was received by those in charge of 474 or 1411 of the location of either of said trains, or of any fact relating to either train. (26) The train dispatcher knew that 474 must overtake 1411 either at Kent Furnace or on the track before reaching Kent; and all of the foregoing facts except those in paragraphs 1, 14, 16, and 24, and the last two lines of paragraph 18, were known or ought to have been known, to him, as well as those contained in paragraphs 49 to 53, inclusive. (27) The snow plow on 474 was in charge of plaintiff's intestate, the assistant roadmaster of defendant, who was engaged in working the flanges,—the

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appliances used in cleaning the tracks, — lifting them when they came to bridges, switches, etc., and lowering them thereafter. (28) Within the front part of said snow plow was a small elevation above its main floor, known as the observatory or cupola, and from which, through two circular windows about fifteen inches in diameter, the track could be seen. The snow plow was so constructed that it prevented a view ahead of the engine by the engineer. (29) Rule 104 of said defendant for the movement and operation of trains provides that 'when a train is being pushed by an engine, a flagman must be stationed in a conspicuous position on the front of the leading car, so as to perceive the first sign of danger, and immediately signal the engineer. (30) The cupola was designed to carry two men, one to work the flanges, and one to act as a lookout. (31) Between West Cornwall and Kent Furnace no one was in the cupola as a lookout or flagman. The assistant superintendent of the division was in said cupola watching the work of the plow, for which purpose he boarded the plow at Falls Village. (32) In the small compartment on the main floor of the plow was a stove, and nine men, who were laborers, to shovel snow in case of a drift, and other employees of defendant. (33) Said day was very cold, and the snow plow threw the snow considerably, rendering it difficult to see ahead. Just before the accident the plow was not throwing much snow, and a lookout could see through said two windows. (34) During the trip from Pittsfield, an employee by direction of the conductor had cleaned the two windows in the cupola every time 474 stopped. It was impossible to clean them while the train was in motion, and these windows had not been cleaned since 474 stopped at West Cornwall, eighteen minutes before. (35) After 1411 stopped at Kent Furnace, the rear brakeman Hall went up the track to flag 474. Rule 97 covered all the duty devolving on Hall and provides: 'When a scheduled freight train is detained at any of usual stops beyond its leaving time, when the rear of the train can be plainly seen from a train mov-

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ing in the same direction at a distance of at least twenty telegraph poles, the flagman must go back with danger signals not less than fifteen telegraph poles, and as much further as may be necessary to protect his train; but, if the rear of his train cannot be plainly seen at a distance of at least twenty telegraph poles, or if it stops at any point that is not its usual stopping place, or if an extra train is stopped at any point, the flagman must go back not less than twenty telegraph poles, and, if his train should be detained until within ten minutes of the time of a passenger train moving in the same direction, he must be governed by rule No. 99.' The employees of defendant occasionally violated this rule, and the conductor of 1411 knew this. Trains sometimes stopped so short a time that a strict compliance with the rule was impossible unless the brakeman was left behind, which sometimes occurred. 474 was an extra train, and Hall's duty under the rules was to go back twenty telegraph poles, and flag the same. This was a distance of three thousand feet, the telegraph poles being one hundred and fifty feet apart. Hall went up the track about six hundred feet, when train 474 rounded a sharp curve. (36) The assistant superintendent saw Hall running up the track, and flagging, as soon as he could have seen from 474; and when 474 was about six hundred feet from Hall he jumped from the cupola to the compartment, and motioned the conductor to stop the train. The conductor at once jumped upon the cupola, and pulled the bell rope twice, but it did not ring the bell in the engine cab. This bell rope connected with the engine, and the engineer relied upon it to warn him of danger ahead. (37) The engineer saw around the sharp curve, from the right-hand side of his cab, Flagman Hall, when about three hundred feet ahead, and he at once did all that he could do to stop 474 by reversing and applying brakes to engine and tender. (38) There was no air brake on said plow, the only brake being a hand brake. (39) Train 474 slowed down in running the nine hundred feet to train 1411, after Flagman Hall

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was seen. It was running about twenty miles an hour when it struck the rear of the freight train as it stood on the main track. It plunged through three freight cars before it stopped. The collision occurred at 11:02 a. m., ten minutes after 474 passed Cornwall Bridge. (40) As a result of the collision, the conductor of 474 was killed, some of the men in the compartment were injured, and the plaintiff's intestate was fatally injured. He lived about two or three hours after the collision, suffering greatly, and then died. He was fifty-one years of age, in good health, and at the time of his death and for some time before, he had been the assistant road-master of the Berkshire Division of the defendant, having been employed on this division some thirty years. (41) Had the engineer been notified through the bell of the flagman ahead, and had he then done all he could to have stopped the train, the collision could not have been avoided, but probably its force and extent somewhat modified. (42) There was no negligence on the part of any of the employes of train 474, or of train 1411, except Rear Brakeman Hall. (43) Said train 474 was properly equipped, and its appliances in good order, except that it had no hospital stretcher on board, as required by statute, and no air brakes on the snow plow. Its appliances were in good order, except the said bell cord and bell. Train 1411 and its appliances were proper, and in good order. (44) The absence of the hospital stretcher in some degree increased the sufferings of the plaintiff's intestate, who had to be removed on boards for some distance, but did not cause his death. (45) Train 474 could have been stopped in about fifteen hundred feet, or the distance of ten telegraph poles. (46) Had the rear brakeman gone back twenty telegraph poles, and signaled, and had those in the cupola or on the engine of 474 seen him, and done their duty, the collision would not have occurred. (46½) The rear brakeman had about time to have gone back three thousand feet after 1411 stopped at Kent Furnace, but not time enough to have returned

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to 1411, nor to have returned within the ordinary time of stopping at Kent Furnace. (47) The rules or regulations for the movement and operation of trains adopted and used by the defendant were substantially the same as those adopted by the American Railway Association after protracted conferences, and revised from time to time at the semiannual meetings of this association. About ninety per cent. of the steam railways of this country are using these rules with such modifications as adapt them to the particular railway. (48) For the general movement and operation of trains these rules are the best and safest general rules yet devised by the best railroad talent of the country. (49) The only protection afforded by these rules to trains 474 and 1411 to prevent their colliding was the rule quoted in paragraph 33, *supra*. These rules were not and are not intended to cover all emergencies. These call often for special orders. (50) No order had been sent 474 or 1411 when they should meet, and it was certain they would meet unless 474 was stopped before 1411 reached Kent. It was part of the train dispatcher's duty to notify trains, not regulated by the time tables and rules, in advance, where they would meet, so that they might know this fact, and collisions be avoided. Ordinary care required such orders, and in his failure to notify trains 474 and 1411 of this he was negligent. (51) Train 474 was a special and irregular train, run for an unusual purpose, for the first time the morning in question. The circumstances of this case were unusual, and present an emergency which probably no general code of rules could provide for, and the rules in question did not provide for. It required special orders and special instructions to trains 474 and 1411, so that train 474 should not collide with 1411 between Cornwall Bridge and Kent. (52) Extra trains are run daily over said division, averaging from eight to fifteen, and some days as high as twenty. (53) It would be impracticable to operate extra and regular trains entirely by special orders. In cases of emergency, this must be done, and general rules cannot cover them.

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The meeting places of trains not upon the time table and of regular trains off the regular time are provided for by special orders, and not governed by the printed rules. (54) Those in charge of 474 and 1411 and Rear Brakeman Hall were familiar with the rules, and knew that in ordinary cases the rules, and not special orders, would govern the movement of all trains on the division. The defendant had exercised ordinary care in the selection of all its employees on trains 474 and 1411. (55) On March 20, 1896, the plaintiff was duly appointed administratrix of the estate of said Jerry Nolan, and duly qualified. (56) Written notice of a claim for damages was made in conformity to the statutory provision. (57) Time table No. 23 and rules (Exhibit B) is made a part of the record, and need not be printed. Copies of the same may be handed to the judges of the supreme court of errors. (58) I find as a fact that these rules did not sufficiently provide for this emergency, and for the reasonably safe operation of trains 474 and 1411. This emergency required the exercise of great care by the defendant, since the danger of collision was great. (59) I find as a fact that the defendant was negligent in not providing for this emergency, and for the safe operation of trains 474 and 1411 by special orders and instructions, in addition to the general rules, and that this collision resulted from the defendant's failure to so provide. (60) I find as a fact that the operation of these trains under these general rules alone, under the circumstances of this case, was not a suitable and safe method to operate these trains. (61) I find as a fact that the train dispatcher did not exercise ordinary care in not issuing special orders for the reasonably safe movement of these trains. (62) I find as a fact that the injury to plaintiff's intestate resulted from the combined negligence of Rear Brakeman Hall and of the defendant. (63) I find as a fact that the defendant did not exercise ordinary care in the movement and operation of trains 474 and 1411. (64) I find as a fact that the plaintiff's intestate was not guilty of any negligence contributing to his injury or death.

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The finding states the defendant's claims of law, as follows: "(1) That, if the collision occurred through the negligence of Rear Brakeman Hall, the plaintiff was entitled to nominal damages only, because Nolan, the plaintiff's intestate, and said rear brakeman, were fellow servants. (2) That, upon the facts in evidence, the defendant, having operated its trains under suitable rules and regulations, and having properly equipped said trains, had performed its entire duty towards plaintiff's intestate, and the law imposed no higher degree of care than that exercised by it. The court sustained the defendant's first claim, and did not pass upon its second claim, except to find as a matter of fact from the evidence submitted that the defendant did not exercise ordinary care in the operation of these trains, and that ordinary care required additional precautions by way of special orders to those provided in the rules for the reasonably safe operation of these trains."

The defendant assigns as reasons of appeal error in the ruling on its second claim of law, and error in inferring, from the facts found, the conclusions stated in paragraphs 58 and 63 of the finding, and error in certain of the conclusions of fact from the testimony given on the trial, a copy of which testimony is certified, and made a part of the appeal record.

Goodwin Stoddard and William D. Bishop, Jr., for appellant.

John Cullinan, Jr., and Thomas M. Cullinan, for appellee.

HAMERSLEY, J. The finding of facts upon which judgment is founded contains a statement in detail of inferences produced in whole or in part by weighing evidence, and the credit to be given witnesses, and also of the conclusions drawn from these inferences. The former are called "facts," as denoting adjudicated facts, which can only be retried by an appellate court having jurisdiction in the trials of such facts. This court does not have appellate jurisdiction of that nature. The su-

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perior court is the court of last resort for that purpose; and its adjudication of such facts. in the exercise of original or appellate jurisdiction, Question of Fact—Review. is the end of litigation, unless, in the process of adjudication, it has violated some rule or principle of law. *Styles v. Tyler*, 64 Conn. 432, 30 Atl. 165; *Thresher v. Dyer*, 69 Conn. 404, 408, 37 Atl. 979. The alleged failure to determine such facts correctly is improperly assigned in the appeal as error, and cannot be considered. The request of council for the certification of testimony in support of such claimed errors is an abuse of the provisions in respect to certifying evidence. *Thresher v. Dyer*, *supra*. The latter—that is, conclusions drawn from such facts—are also called facts, but with a much broader signification, including all issues that the line separating the province of the jury from that of the judge in a jury trial practically leaves to the jury. The word “fact,” used in this broad sense, does not accurately denote matters not reviewable by this court. In defining facts as denoting those questions practically within the province of a jury, we are controlled, not only by established practice, but by the constitutional provision forbidding any violation of the political “right of trial by jury.” In defining facts as denoting questions not reviewable by this court, we are controlled by “the primary distinction drawn by the constitution between the jurisdiction, original and appellate, of courts for the full trial and adjudication of causes, and the jurisdiction of a court of last resort for correcting errors in law which may have intervened in the course of a trial.” *Atwater v. News Co.*, 67 Conn. 504, 526, 34 Atl. 871. “The true distinction, as drawn under our system of jurisprudence, in connection with this provision of the constitution, between facts that the trial court must find from the testimony, and the application of principles of law based upon such facts,” includes “questions of law,” as distinguished from “questions of fact,” in a jury trial, but is not fully expressed by that distinction. While the jurisdiction of this court may be affected in

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its practical operation by existing procedure or practice, the jurisdiction itself "is co-extensive with the judicial power of the state in all matters wherein legal principles—that is, rules of law or principles of equity—appear to have been erroneously or mistakenly determined by a trial court." *Styles v. Tyler*, 64 Conn. 454, 30 Atl. 172.

The limitations of procedure formerly existing in connection with the practice followed in view of that procedure, prevented in some instances the full exercise of our jurisdiction, and the conclusions of trial courts, because not presented in such manner as to be reviewable under existing procedure and practice, have been spoken of in language appropriate enough for the purpose, as questions of fact. But whenever the record before us has legally presented all the facts found by the trial court as the basis of its judgment, and the conclusion drawn from those facts has been plainly erroneous, and such error has been lawfully assigned, we have uniformly held such conclusion, although for some purposes it might be called a question of fact, to be, *quoad* the jurisdiction of this court, a question of law; *i. e.* it is reviewable. When the finding of facts states evidence so that the conclusion must be reached by weighing evidence, the finding is essentially a report of evidence, and not a statement of facts adjudicated; and the question of legal inference from facts that may be involved is irregularly presented. *Corbin v. American Mills*, 27 Conn. 274, 278. In *Bloodgood v. Beecher*, 35 Conn. 469, the judges were equally divided upon the question whether, upon the finding of facts in that case, the intention of a mortgagor to prefer the mortgagee to his other creditors could be drawn by this court as a conclusion of law; HINMON, C. J., and PARK, J., holding that it could not, and BUTLER and CARPENTER, JJ., holding that it could. The case was decided by the second vote of the Chief Justice. In *Mead v. Noyes*, 44 Conn. 487, the trial court, in an action of replevin, spread upon the record the facts from which it drew its conclusion that the plaintiff

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was the owner of, and entitled to immediate possession of, the property replevied. Upon motion in error, this court reversed the Judgment, because the conclusion from the facts found was an error in law. In *Hayden v. Allyn*, 55 Conn. 280, 289, 11 Atl. 34, JUDGE LOOMIS, speaking for the court, laid down the broad principle that whenever, in trials to the court, the Judge has fully weighed the testimony, and passed upon the credit of witnesses, and specifically found, as the basis of his judgment, the inferences produced by the testimony, so that the evidence "had exhausted itself in producing the facts thus found, nothing remained but for the court, in the exercise of its legal judgment, to draw its inferences from the facts;" and "in such a case the conclusion of the court can always be reviewed by the appellate court. An erroneous conclusion is an error of law, and not an error in an inference of fact." This principle was deliberately affirmed in *Tyler v. Waddingham*, 58 Conn. 374, 386, 20 Atl. 335, and applied to a special finding of facts, from which was drawn the conclusion that the plaintiff, at the time of making a contract with a partnership, elected to give exclusive credit to a single partner. In *Ward v. Ward*, 59 Conn. 188, 197, 22 Atl. 149, the principle is recognized as established, although its application in that case is treated with some subtlety. The principle may at times be misapplied, but a mistake of this kind cannot shake its authority. It is not only supported by the true *ratio decidendi* of a long line of decisions, but is imbedded in the very structure of our system of jurisprudence. Settling the credit of witnesses, weighing evidence, ascertaining the truth from conflicting testimony or incongruous evidential facts, this is the peculiar province of, and under our system within the exclusive jurisdiction of, trial courts; and a mistake in the inference produced by such means is an error in fact. When such facts are adjudicated, a mistake in drawing the legal inference—*i. e.* in applying the law to the facts found—is an error in law. The application of this principle has been hampered, and its meaning

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somewhat obscured, through inadequate and uncertain methods for bringing into action the jurisdiction of this court. Sometimes the conclusion of a trial court from conceded facts is so clearly right that practically no question is presented; and in such cases we have said that the conclusion is one of fact, properly decided; yet if in such cases the conclusion instead of being clearly right, had been a palpable *non sequitur*, we would have reviewed it as a question of law, unless the question were irregularly presented. But more frequently the alleged error in a conclusion from conceded facts has been irregularly presented, either through mistake in making up the record, or through defect in methods for obtaining a record which should properly present the question; and in such cases we have said that the conclusion is one of fact, not reviewable. Such indeterminate use of the phrase "question of fact" or "conclusion of fact" must be taken in connection with the circumstances of each case, and cannot be treated as precisely distinguishing those conclusions which are to be treated as facts in respect to the jurisdiction of this court, nor as modifying the settled principle that the unwarranted conclusion of a trial court in drawing its inference from the special facts which, in compliance with existing law of procedure, it has found for the purpose of drawing that inference, is essentially an error in law.

For many years, and especially since 1879, the legislature has endeavored, by means of various statutes, to modify the law of procedure so as to require a trial court to place upon record the special facts on which its judgment is founded, and to enable this court to exercise its full jurisdiction in reviewing the legal judgment of a trial court in drawing its inference from conceded facts. Such legislation has considerably enlarged the facilities for exercising the jurisdiction of this court. The effect of this legislation has been the subject of frequent consideration, and the main general conclusions reached are summarized in *Thresher v. Dyer*, *supra*, and *Winsted Hosiery Co. v. New*

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Britain Knitting Co. 69 Conn. 565, 575, 38 Atl. 311. In the latter case we say: "The judgment or ultimate conclusion of a court upon the special facts in issue, as ascertained from the evidence and settled by the trier, is a conclusion of law, and, as such, reviewable by this court; and this is true whether such facts are settled by a special verdict of a jury or by a special finding of a judge;" and referring to the changes in procedure: "We think that the result of this legislation is that in cases tried to the court the judge is now authorized, and upon request required, to find and state in a special finding the facts adjudicated by him in reaching his ultimate conclusion, including all specific facts which, when so adjudicated, must determine the ultimate conclusion, and subordinate conclusions involved therein, by force of settled rules and principles of law. The judgment rendered on such an adjudication of facts is simply the voice of the law declaring the legal effect of the facts adjudicated."

Same—Same—
Same.

These considerations must control the disposition of the claim made in the case before us, that the conclusions we are asked to review are conclusions of fact, and not of law.

It appears that the defendant operated a single-track railroad; that train 474 (an extra train), following train 1411 (a regular way freight), ran into the latter train, which had stopped to attach some freight cars standing on a siding; and in the collision one Jerry Nolan, the plaintiff's intestate, was killed. Every special fact from which the trial court inferred the liability of the defendant for the injury is found, including the rules and regulations adopted by the defendant for safely operating these trains. The finding shows the neglect of one Hall, the rear brakeman of train 1411, to obey the rules provided for the protection of his train under such circumstances, and that the collision might not have happened if the rules had been obeyed, but also shows that Nolan and Hall were fellow workmen; and the trial court therefore holds that the defendant

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is not liable for this neglect. The question of liability is not otherwise effected by the relation of master and servant. The complaint does not allege that this relation existed between Nolan and the defendant, and claims nothing by reason of that relation, but charges the defendant with negligently conducting itself in the management of said trains; and the only allegations, so far as is material under the finding of acts constituting such negligent conduct, are: "By failing to give proper telegraphic information to the conductor and engineer of each of such trains relative to the position of the other of said trains," and "by failing to exercise proper supervision of the running of said trains," so that train 474 ran into train 1411, and, as a result of the collision, said Nolan, who was rightfully on the former train, was killed. The trial court draws from the special facts found the following inferences: That the rules and regulations of the defendant "did not sufficiently provide for this emergency (*i. e.* the operation of the trains in the manner as found), and for the reasonably safe operation of trains 474 and 1411; * * * that the defendant was negligent in not providing for the emergency (*i. e.* the operation of the trains as found), and for the safe operation of trains 474 and 1411, by special orders and instructions, in addition to the general rules; * * * that the operation of these trains under these general rules alone, under the circumstances of this case (*i. e.* the special facts as found), was not a suitable and safe method to operate these trains; * * * that the train dispatcher did not exercise ordinary care in not issuing special orders for the reasonably safe movement of these trains; * * * that the injury to plaintiff's intestate resulted from the combined negligence of Rear Brakeman Hall and of the defendant; * * * that the defendant did not exercise ordinary care in the movement and operation of said trains 474 and 1411." These inferences are reviewable as conclusions of law. It is true that, in stating the inferences, the trial judge says, "I find as a fact,"

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etc., but this is immaterial. It is the duty of the trial judge to find, as facts within the peculiar province of a trial court, those inferences which are controlled by the weighing of evidence and the credit given to witnesses.

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clusion of Law.

It is also his duty to find his conclusions drawn from these inferences of fact; and, in a certain sense, these latter are findings of fact, but they are conclusions reviewable by this court, and the name given them does not alter their intrinsic character of conclusions reviewable for error in law.

We think the court below erred in reaching these conclusions. They are all drawn in support of the claim set up in the complaint that the defendant violated the legal rights of the plaintiff's intestate, because it failed to exercise proper supervision of the running

Same—Same—
Rules—Suf-
ficiency.

of said trains, and because it failed to give telegraphic information to the conductor of each train relative to the position of the other. The supervision of the trains (unless as involved in the failure to give telegraphic information) is to be found in the rules for the movement of the trains. These rules are before us. They are substantially the same as those in use by about 90 per cent. of the steam railways of this country; and the trial court finds that, "for the general movement and operation of trains, these rules are the best and safest general rules yet devised by the best railroad talent of the country." There is nothing in the record that calls for a review of this finding. For the purposes of this case, we assume the conclusion to be correct. These rules cover the movement of regular and extra trains. They provide for special orders for starting extra trains. They require the train dispatcher to give telegraphic information of the meeting place of such trains, and of trains moving in the opposite direction, as well as of regular trains off the regu-time. But they do not require him to inform, by telegraph, trains moving in the same direction of their relative position, and for that purpose to keep in mind

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the position of all such trains, so as to decide, as they approach each station, whether there is a likelihood that a rear train may overtake, and, if the rules are not obeyed, run into, the forward train. On the contrary, they are drawn upon the theory that such telegraphic supervision of trains moving in the same direction, in view of all the conditions involved in operating a single-track road, tends rather to lessen than increase the safety secured by the rules adopted relative to the movement of such trains. The soundness of this theory has received judicial sanction. *Enright v. Railway Co.*, 93 Mich. 409, 413, 53 N. W. 536; *Railroad Co. v. Neer*, 31 Ill. App. 126, 134. In the latter case some self-evident reasons are given. We think in this respect the rules of the defendant do not violate its legal duty, and that their compliance or noncompliance with that duty, under a given state of facts (notwithstanding many cases hold that such questions must be submitted, with instructions more or less precise, to a jury, by force of the law defining the province of a jury), is essentially an inference of law, and, when drawn by a trial court, is reviewable by this court. So far, therefore, as the proper supervision of trains 474 and 1411 depended on the adoption of adequate rules for the safe operation of those trains, the only legal inference from the facts found is that the defendant did not fail to exercise proper supervision of the running of these trains.

The failure to give trains 474 and 1411 telegraphic information of their relative positions is found as a fact, and the conclusions of the trial court are simply an inference from this fact, in connection with other facts found, that the defendant, by this means, had violated the legal rights of the plaintiff's intestate. In other words, the inference is one of legal liability, and affirms that the law which defines the duties of railroad corporations, and the rights of persons lawfully on their trains, imposed upon the defendant the duty of giving such telegraphic information, and gave to the plaintiff's intestate the correlative right to have such information

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given. The validity of this inference is really determined in the disposal of the claim that the rules of the defendant did not fulfill its legal obligation in the supervision of those trains under the circumstances of the case; *i. e.* the facts as found. The rules do not require such information to be given, because giving such information in all instances involving like conditions would tend to danger, rather than to safety. A railroad corporation, in operating its road as a *quasi* public highway, is engaged in a business dangerous to human life, and is exercising for its private benefit a franchise granted by the state, on condition that it transport such members of the public as have lawful occasion to use the highway with every precaution for their safety that public policy, as fixed by legislation or recognized by adjudication, requires. For these reasons, the law imposes upon the corporation a duty to use such precautions. That duty it owes to each person lawfully on its trains; and this, independently of any special duty arising from a contract of carriage or employment. *McAdam v. Electric Co.*, 67 Conn. 445, 447, 35 Atl. 341. Each person lawfully on a train has a right to the protection of such precaution, and is entitled to damages for any injury done him in violation of this right. In holding that the rules for the supervision of trains under conditions like those attending the trains in question fulfilled the legal duty of the defendant in this respect, and that public policy does not require these rules to prescribe giving telegraphic information in the manner claimed, we necessarily hold that giving such information to these particular trains on the day specified is not a precaution required by public policy, and is not a duty imposed upon the defendant by law, and therefore a failure to give such information did not violate any legal right of the plaintiff's intestate.

But the claim is made that the conditions attending trains 474 and 1411 differed essentially from the conditions in general attending trains moving in the same direction, and differed so essentially as to an exceptional

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case or emergency, unprovided for by the general rules, and of a character so peculiar to itself as to throw upon the defendant or its vice principal, the train dispatcher, the duty of acting, in view of all these exceptional circumstances, as a man of ordinary prudence should act; that the trial court has found that the train dispatcher did not so act; and that such a finding can never be reviewed by this court. This, in truth, is the real ground of the judgment, and the very gist of the question before us. We think the conditions attending trains 474 and 1411 did not differ essentially from those in general attending trains moving in the same direction, and did not create an exceptional case or emergency unprovided for by the rules; and that the finding of such emergency by the trial court is an inference from the special facts found reviewable by this court. The conditions in general attending trains moving in the same direction under the rules, without telegraphic information of their relative position, includes: All trains regular and extra, made up in all ways, even to a single engine; trains off their regular time, way freights being commonly behind time; stopping places for trains which are used only occasionally and not at regular intervals; trains moving at all times of day and night, and in all conditions of weather and atmosphere; trains moving at various rates of relative speed. The special facts found from which, apparently, the inference of an exceptional case or emergency is drawn are the following: Train 474 consisted of an engine pushing a snow plow. Train 1411 was upward of an hour behind its schedule time. Train 1411 stopped to attach three freight cars at Kent Furnace, which is merely a siding where freight trains stop occasionally and at irregular intervals. The rear train, when in motion, moved at a faster rate of speed than the forward train. The day was very cold, and the snow plow threw snow considerably, rendering it difficult for the lookout stationed on the snow plow to see ahead. Just before the accident, the plow was not throwing much snow, and the

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lookout could see. We think the conditions shown by these special facts, considered by themselves or in connection with all the special facts found, are within the conditions in general attending trains moving in the same direction; do not constitute an exceptional case or emergency unprovided for by the general rules; and did not throw upon the defendant or its train dispatcher the special duty of keeping the conductors of those trains informed by telegraph of their relative position. No other inference can be legally drawn from the facts. A conclusion from conceded facts drawn by a court in the exercise of its legal judgment, and controlled by the assumption that two and two make five, is just as truly an error in law as if it were controlled by the assumption that an ordinary breach of contract calls for exemplary damages. In the present case the error is not of this palpable kind. As a matter of first impression, there is room for hesitation and doubt; but, upon full consideration, it seems to us that the legal inference is clear, and that, in reaching its conclusion, the court below, unless influenced by the error involved in its inference that the rules adopted were inadequate, has failed to apply to the facts those settled principles of sound reasoning whose recognition and application are termed the soul of the law.

The plaintiff relies mainly upon the recent case of *Sprague v. Railroad Co.*, 68 Conn. 345, 36 Atl. 791. In that case the plaintiff's intestate was a servant of the defendant, and was killed in a collision between his train and the train moving in the opposite direction, caused by the misconduct of the conductor of the opposite train. The complaint charged the defendant with liability on account of its violation of its duty as master in employing the conductor at fault to run this train, knowing him to be incompetent. Any other violation of duty on the part of the defendant was inseparably entangled with this, the real ground of the action. The main question considered was one of law as to the use of the admissions of a demurrer overruled upon a hearing in damages.

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Aside from this our decision turned wholly upon the question whether, upon the facts as stated, we could find error in the conclusions of the trial court that the conductor was incompetent; that the defendant knew or ought to have known that he was incompetent, and with this knowledge placed him in charge of the train where his incompetency caused the injury. Here the inference of legal liability from the conclusions of fact as stated was unquestioned. The finding shows that these conclusions were not inferred from subordinate specific facts found, but depended in part upon the weighing of evidence and credit given to witnesses. This sufficiently appears in the opinion, but more clearly in the record, which is not printed in the report. We held that such conclusions were plainly conclusions of fact, within the province of the trial court. No question was presented as to a conclusion from specific facts found where such conclusion is clearly a *non sequitur*. The defendant claimed that the question of its violation of a legal duty, by reason of the insufficiency of its railroad management, was a pure question of law. In referring to this claim, the opinion holds the question to be irrelevant to the case in hand, and that, if the principle claimed is sound, it cannot control emergencies which no system of rules can anticipate and provide for. It is in this connection that the language especially relied on, relative to emergencies, is used. The language must be read in this connection, and in view of the circumstances of the case then before us. So read, the language does not establish any principle inconsistent with the views expressed in the present case.

After stating the specific facts found and the conclusions from those facts (which statement is strictly a part of the judgment, specially setting forth the facts on which it is founded), the finding states that the defendant claimed, as a matter of law, "that, upon the facts in evidence, the defendant, having operated its trains under suitable rules and regulations, and having properly equipped said trains, had performed its entire duty towards plaintiff's intestate, and the law

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imposed no higher degree of care than that exercised by it"; and that the court did not pass upon this claim "except to find as a matter of fact, from the evidence submitted, that the defendant did not exercise ordinary care in the operation of these trains, and that ordinary care required additional precautions, by way of special orders, to those provided in the rules for the reasonably safe operation of these trains." The trial court did not err in refusing to sustain this claim of law in the terms in which it is phrased, but it did err in inferring from the specific facts found that it was the legal duty of the defendant to give the telegraphic information mentioned; and, for the purposes of review, this inference is not a conclusion from the evidence, which the finding shows had exhausted itself in producing the conclusions of fact from which the inference was drawn. This error is not raised by the assignment specifying error in the refusal to sustain the claim of law, but is raised by the assignments specifying the reasons why the facts specially set forth do not support the judgment founded upon them. The only function in this respect of that part of the finding reciting the claim of law made is to show that the questions as to the legal inferences from the facts found were distinctly raised at the trial, and decided adversely to the appellant's claims. The real position of the plaintiff is that the trial court has found that the defendant failed to exercise ordinary care under the circumstances of this case; that the legal liability of the defendant consists in negligence; that the failure to exercise such care is negligence; that negligence is a question of fact entirely within the province of a trial court; and therefore the law determining the legal liability of the defendant was properly found as a fact within the exclusive province of a trial court to determine. We have already indicated the mistake involved in this position; but it is a mistake so often made, and so readily fallen into through the use of words expressing different ideas without due attention to the particular

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idea the word, as used, is intended to express, that we deem it advisable to restate the ground of our decision with special reference to the confusion of ideas that leads to such mistakes.

We are dealing with a practical question of procedure: *i. e.* upon the process or record before us, what are the alleged errors that this court can review? The answer is briefly and broadly expressed in the saying, "Errors in law can be reviewed; errors in fact cannot." As we have seen, "fact" is a word of many meanings, and the saying is deceptive unless we keep in mind the particular meaning attached to the word as here used. We have explained that "fact" as here used, denotes those conclusions reached by the trier directly, from sifting testimony, weighing evidence, and passing on the credit of witnesses (conclusions which are not within the jurisdiction of this court, and cannot be reviewed or retried on appeal, whatever the process may be), and that it does not denote those inferences drawn by the trial court from the facts ascertained and settled by it as described (inferences which always involve, to some degree, the application of rules and principles of law to adjudicated facts, and may be reviewed whenever the legal process properly presents an alleged error, and we can see that the inference as to which error is alleged is in truth one of this nature). The word, as here used, may possibly have a little broader meaning in some exceptional cases, but this is immaterial to the purpose in hand. We have also explained that the word "fact," as here used, must be distinguished from the same word when used to denote those matters within the province of a jury. In the latter sense it often denotes the whole question of legal liability, which, by the law of jury trials, must in certain cases be settled by a general verdict; and so far as it may be used, in connection with jury trials, to denote inferences from evidence as distinguished from inferences from adjudicated facts, it is, of necessity, used with an imperfect or uncertain meaning. The trial judge, in instructing a jury upon inferences of law, cannot ordinarily know what the

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inferences from evidence may be, and in all such cases must give his instructions hypothetically, and is limited in this by the consideration that the law of jury trial forbids his giving instructions upon the law in such manner as in truth to invade the province of the jury in drawing inferences from evidence. Whereas, in a trial to the court, the judge first adjudicates all the facts (*i. e.* inferences drawn from the evidence), and puts upon record those facts. The inference from those facts of legal liability, or of the conclusions essential to legal liability, presents to us, in a lawful process for that purpose, the questions of law, free from the limitations which hamper a trial judge in instructing a jury upon the same question. And it must be remembered that while there is in theory a distinction of a fundamental nature between the judicial function exercised in ascertaining facts from evidence, and that exercised in applying to conceded facts the rules of law for the purpose of inferring logical conclusions and legal liability, yet the two functions are essential to the one judicial act of passing judgment, and the precise line of distinction has little, if any, practical importance, except when the exercise of judicial power is divided between two branches of one court, as in a trial by jury, or is divided for the purpose of establishing an appellate court with a jurisdiction pertaining to the judicial function exercised in applying to conceded facts the rules of law, as in the correction of errors in law by this court. In such cases the necessary line of division, although based on a natural distinction in the character of judicial power exercised for the different purposes, may become, as in this case, a practical question of procedure.

Again it must be remembered that the rule defining the erroneous conclusions of a trial court which this court can review is, and must be, of universal application. There is not a different rule for each class of actions. Actions in tort as well as actions in contract, actions to recover damages resulting from intentional wrongs as well as to recover damages resulting from

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wrongs not intentional, are all subject to the same rule; and actions of tort or contract, wherein questions of negligence arise, are subject to the same rule. The mistake in question is largely due to overlooking this, in the confusion caused by a failure to distinguish, when the word "negligence" is used, the precise one of its many meanings intended to be expressed through the particular use. "Negligence" is frequently used to express the cause of action where a party seeks redress for injury from an unintentional wrongful act. In the nomenclature of the common law, this is called a "cause of action enforceable by the action of trespass on the case,"—"trespass" as signifying a passing over or beyond our right, *i. e.* a transgression or wrongful act (Bac. Abr. ad verb); "trespass on the case" as signifying a form of action devised to cover all cases where an actionable wrong is claimed under the particular circumstances of the case stated. "Negligence," so used, is a comparatively modern term of art, denoting a class of actions grouped under one head for the purpose of study and treatment. It covers the injury received; the act done, positive or negative; the proximate relation of the act to the injury; the legal rule of liability applicable to the case stated, and the application of that rule. The numerous definitions of "actionable negligence," attempt to state briefly and comprehensively the conditions essential to all of this group of actions. So used, "negligence" has no more relation to the question before us than if the meaning denoted were expressed in the older language of the common law,—those causes of action where the appropriate remedy is an action of trespass on the case to recover damages for an unintentional injury. Related to this meaning, and sometimes confused with it, "negligence" is used to denote the conception of moral blame or fault imputed to a person legally liable for the consequences of an unintentional act. This conception of the moral blame which should make one liable for the consequences of his acts is the foundation of our law of tort, and, in a wider sense, of our whole system of jurisprudence. In

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the very early stages of English law this element of moral blame, in cases where the conception seemed too subtle for the times, was overlooked, and the innocent cause of a condition resulting in injury was held liable for damages to the innocent victim. But the true theory, that moral blame is an essential element of legal wrong, was soon fully recognized, largely through the potent and unacknowledged influence of the Roman law. "*Dolus (i. e. injuria quam quis sciens volensque commisit) aut culpa (i. e. omnis protervitas, temeritas, inconsiderantia; desidia, negligentia, imperitia, quibus citra dolum, cui nocitum est)*," as used in the Lex Aquilia, and as approximately expressed in our common law by the terms "intention or negligence," describe the two phases of the moral blame or fault essential to make the one causing damage legally liable. 2 Aust. Jur. 109. The body of our law has been developed through the application of this conception to an infinite variety of facts or events. It has its origin in the accepted law of ethics, and the unfolding of its meaning as a legal maxim is confided to the court. Indeed, the highest function of a judge is exercised in holding to a steady and definite course in the application of such a maxim to ascertained facts, whether their conjunction be novel or not. In the exercise of such a function, our system of jurisprudence develops under the control of fixed maxims and prior authorities. It is this control of the element of discretion inherent in the application of a general principle to each new state of facts that distinguishes the justice administered by a common-law judge from that of an oriental cadí. Whether this primary conception of moral blame is vague or not in itself, the principle of legal liability which in theory it justifies is certain. The legal liability is not wholly coincident with the moral blame. It depends upon the law, however derived; and that law consists mainly in rules of public policy defining and limiting the rights and duties pertaining to person and property. These rules are ordinarily intended to square with the highest theory of ethics,—an intention not always realized. But

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it is the law, and not the theory, which determines legal liability. No principle of legal liability which is, in the legal sense, uncertain,—which is derived, not from settled maxims and authority that must govern every case, but from the unrestrained will of a single man, or a dozen men, which can govern no other case.—is a legal principle. “*Ubi jus incertum, ibi jus nullum.*” “Negligence,” with the meaning under discussion, is a convenient term for denoting the conception of legal blame in a certain class of causes of action for the purpose of investigating the theory underlying the law which determines liability in such cases. It is a term more useful to the jurist, in seeking the theoretical sources of the law, than to the judge in applying positive law to conceded facts. Used in this sense, “negligence” is largely synonymous with the “law of liability,” in this class of actions (although it hardly covers the whole law of liability in such cases), and denotes a principle which is essentially compound, *i. e.* one which includes a variety of maxims and rules, any or all of which may be involved in its application to particular cases. This use of the word might not have produced the confusion it has led to, were it not that one of the rules covered by the term “negligence,” and one most frequently invoked in actions of this character, involves the use of “negligence” with the primary meaning of the word; and so the considerations peculiar to this single rule have been easily commingled with those applicable when the same word is used, not with its primary meaning, but as a term of art signifying the whole principle of legal liability. “Negligence,” thus used, is scarcely distinguishable from “heedlessness,” and may be shown in omitting to do an act, or in doing an act. When the law says a person whose conduct is negligent (in this sense), the other conditions of liability existing, is liable for damages caused by his conduct, the meaning of “negligent,” like the meaning of any material word used in stating a rule of law, is a question of law, to be settled by the courts, whose province it is to declare the law; and, where the rule is

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intended to apply to an indefinite variety of events, the meaning of the rule in its application to each group of events is a question of law for the court. So it has been held in cases of "reasonable" notice to take a deposition (Sharp *v.* Lockwood, 12 Conn. 155, 159; Sing Cheong Co. *v.* Yung Wing, 59 Conn. 535, 543, 22 Atl. 289); "reasonable" time for presenting a note for payment (Lockwood *v.* Crawford, 18 Conn. 361, 372); "reasonable" or "diligent" search for a lost document (Kelsey *v.* Hanmer, 18 Conn. 311, 317); and the principle may be illustrated in other ways. This is elementary law. Were it not so, the growth of any stable system of jurisprudence would be far less practicable. No difficulty can arise where the group of events calling for the application is clear and certain. But where, as sometimes happens, the group of events in respect to which the meaning of a word must be declared are of a nature insusceptible of clear statement, then, while the function of ascertaining facts from testimony, and that of applying the law to the facts, should be separately exercised by the trial judge, yet any adequate separate statement by him, in the record, of the results (*i. e.* the facts ascertained, and the application of the law to those facts) may be impracticable. Dilemmas of a similar nature account for most of the troublesome questions relating to the instruction of a jury by the court. In a trial to the court, where the two functions are united, there is no difficulty, so far as the disposition of that case is concerned; but, inasmuch as a statement of the facts is impracticable, the application of the law is not apparent, and the case cannot serve as a precedent, and cannot be reviewed for error in law by an appellate court. In a large number of cases the material question is whether the ascertained conduct of a person is in law negligent, in the sense last indicated. Often the ascertained conduct cannot be formulated into a series of adjudicated facts. It consists of a single impression produced in the mind of the trier by the whole mass of relevant testimony. That impression cannot be stated in words. It is a

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mental view which language is not luminous enough to photograph. Is that conduct negligent in law? Clearly, the conclusion of the trier that it is or is not must be, *quoad* the trier, a conclusion of law.

Whether it be considered as an inference from many facts, or as the declaration of the meaning of a rule of law in relation to a single fact, it is the inference of a legal wrong from ascertained fact, and that is essentially a conclusion of law. Equally clearly the conclusion of the trier must be, *quoad* the power of this court to review his inference, a conclusion of fact. Not because the inference is not one of law, but because the fact or facts from which the inference is drawn cannot, by any process known to the law, be transferred from the mind of the trier to the mind of the appellate court. When such a question comes before us, we say we will not attempt to review the conclusion; it is one of fact; and this notwithstanding the trial judge has conscientiously tried to give in his finding a word picture of a mental impression that cannot be painted in words. He has not succeeded. He cannot succeed. The precise legal inference he has drawn must remain unknown. It cannot, therefore, be reviewed, and is practically a conclusion of fact. Now, this condition may arise in any kind of action, and is not peculiar to actions of negligence; using the word as a term of art describing a certain class of actions.

The mistake of the plaintiff arises mainly from confusing an ascertained fact,—where the fact is conduct claimed in law to be negligent,—incapable of transference from the mind of a trial court to that of an appellate court, with the legal inference drawn by the trial court from that fact, and which cannot be reviewed because the appellate court cannot have the fact from which the inference is drawn before it, and then applying the practical result of such a condition to the inference of liability in all actions classed under the term “actions of negligence.” And this confusion arises mainly from the fact that the word “negligence,” as used in respect to the same general subject, has

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entirely distinct, although closely-related, meanings, dependent on the particular purpose for which it is used. A similar confusion arises from the use of "ordinary care," which is used sometimes in reference to actual conduct under circumstances, as found by the trier, incapable of being so formulated in a finding as to state the facts really adjudicated, and show the inference actually drawn, and sometimes as indicating the rule of legal liability under any given state of facts.

As used in the latter sense, it may denote the ultimate ground of every cause of action.

In the present case we hold that the inference of legal liability drawn by the trial judge is reviewable, because the events upon which the cause of action arises are of such a nature that they can all be fully and clearly found by a trial court as adjudicated facts, and have been so found, and properly appear before us in the record; that the conclusion of the trial court of an "emergency" which required of the defendant a line of conduct appropriate only to the single transaction in question is reviewable, because this subordinate conclusion is drawn from adjudicated facts fully and clearly found in compliance with existing law of procedure, and the trial court, in reaching the conclusion,—unless the law defining such an emergency was misapplied,—has plainly mistaken those rules of sound reasoning whose observance is essential to the validity of an inference from admitted facts.

In stating our conclusion, we have not sought to lay down a binding rule, but have merely endeavored to explain, as far as the infirmities of language will permit, the test of our decision in this case. We believe that such a test, if applied (with discrimination as to the circumstances of each case) to the whole line of our decisions where the question of reviewability of errors alleged in inference of trial courts has arisen, will reconcile those cases, as resting on a ground substantially the same in all. This question was very carefully considered in *Farrell v. Railroad Co.*, 60 Conn. 239, 21 Atl. 675, and 22 Atl. 544. The opinion of

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JUDGE TORRANCE in that case touches *cum acu* the root of the difficulty; and has been our main guide in subsequent decisions. The underlying principle was there considered with special reference to contributory negligence, where the ascertained fact could not be stated in the finding, and so the inference of the trial court could not be reviewed, and remained, for all practical purposes, a conclusion of fact. In this case we consider the same principle with special reference to the question of legal liability where the adjudicated facts can be, and are, fully set forth. And the task of testing the principle is now of a somewhat different nature, and easier than it was then, by reason of further changes in procedure, and our decisions upon the effect of such changes in enlarging the facilities for the full exercise of our jurisdiction in correcting the erroneous inferences of a trial court.

We allude to some matters suggested by the record merely to avoid any implication from a failure to mention them. It is claimed that one or two of the facts stated as found from the evidence are in reality nothing but deductions from the rules, or from other facts found, and as such erroneous. The facts referred to have too slight a relation to the controlling question to call for particular comment. As a whole, the finding is exceptionally full and clear, and furnishes proper facility for its correction in the matters complained of, were such correction necessary. It is claimed that the court erred in its conclusion that the injury resulted from the combined negligence of the brakeman, Hall, and the defendant. The Massachusetts case of *Hayes v. Railroad Corp.*, 3 Cush. 270, apparently supports this claim. As we hold that the court erred in finding the defendant negligent otherwise than by reason of the fault of its brakeman, the question is not material, and we do not pass upon it. The court finds that "the employees of the defendant occasionally violated this rule [the one whose violation by the brakeman caused the collision], and the conductor in charge of 1411 knew this." If there were other facts in connection with

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this clearly showing that the rule was not enforced through the neglect of the defendant, a different question would arise in respect to its liability. The duty imposed by law upon the defendant is not fulfilled by merely adopting adequate rules. The law imposes upon it a duty in respect to the enforcement of rules necessary for the protection of the public. This question was considered in *Gerrish v. Ice Co.*, 63 Conn. 9, 16, 27 Atl. 235, and is discussed in *Railway Co. v. Hammond*, 58 Ark. 324, 332, 24 S. W. 723. It is not raised in this case. The judgment under review is controlled by the conclusion that the collision in which Nolan was killed was caused by the legal negligence of the brakeman, Hall, in conducting the business of the defendant, and that the defendant escapes liability solely on the ground that Nolan, the victim of the wrong, as well as Hall, through whom the injury was done, was its employee.

Negligence of
Fellow Servant—
Liability.

The rule which produces such a result is too firmly established as law by a multitude of decisions to be now reversed or seriously modified by any exercise of the power vested in courts. There is error. The judgment of the superior court is set aside, and the case is remanded for assessment of nominal damages. The other judges concurred.

NOTE.—The rule is one deduced by a process of analogy from decisions rendered under a state of society very different from that of to-day, and the crystallization of such analogies into a binding rule is of comparatively modern origin. It first appeared in England in *Priestley v. Fowler*, 3 Mees. & W. 1, and in 1850 was applied to the employees of railroad companies in *Hutchinson v. Railroad Co.*, 5 Exch. 343. In 1841 it was formulated in South Carolina (*Murray v. Railroad Co.*, 1 McMullan, 385), and in 1842 in Massachusetts, in the leading case of *Farwell v. Railroad Corp.*, 4 Metc. 49. The very able opinion of CHIEF JUSTICE SHAW in the last case has largely dominated the law on this subject during the past 50 years, and contains the most plausible statement that can be given of the

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grounds supporting the public policy which compels a workman entering in the service of a master to assume the whole risk of any injury that may be done him by the master through the misconduct of a fellow servant. The vigorous language of this statement, however appropriate it may have been at that time, has a touch of grim irony when read in the light of existing conditions in the employment of labor. In England in 1880, the rule was changed by the employers' liability act, and is now practically abolished, as to large classes of workmen, by the workmen's compensation act, passed during the present year. The rule has been dealt with by legislation in several of our sister states. It was first formally recognized in this state in *Burk v. Railroad Co.*, 34 Conn. 474, 479, with a strong protest against the sufficiency of the grounds for a principle deemed too firmly settled in other jurisdictions to be differently treated here. In *Darrigan v. Railroad Co.*, 52 Conn. 285, the application of the rule was somewhat modified, and possibly cases may arise where the legitimate exercise of the duty of the court in applying established principles to novel conditions may involve some limitations of its apparent reach. But the evil is too deep-seated to be remedied by judicial action. It needs radical treatment through wise legislation.

NOTE.

Rules—Sufficiency.—The law does not require a railroad company to direct the movement of its trains by orders from the train dispatcher alone or by a system of signals only, nor does it require the company to adopt any particular form of orders or any particular system for communicating them; but it has the right to direct the movement of its trains by train orders alone, or by any train orders of any form and signals, or by signals alone, or by the time card alone, provided that the means adopted are brought to the knowledge of its employees, and they are reasonably well calculated to secure the safety of the men, if obeyed. *Hannibal & St. J. R. Co. v. Kanaley*, 39 Kan. 1, 17 Pac. Rep. 324.

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MATTHEWS

v.

MISSOURI PAC. RY. CO.

(*Supreme Court of Missouri, Nov. 23, 1897.*)

Fires Set by Locomotives—Admissibility of Evidence.—In an action against a railroad company for damages for the destruction of plaintiff's barn, alleged to have been caused by sparks from defendant's locomotive, evidence to show that a spark from one of defendant's locomotives subsequently fell upon a tent standing upon the ground where the barn had stood was admissible; and it was not necessary for plaintiff to show before introducing such evidence that the conditions at the time were the same as those existing at the time of the destruction of the barn.

Same.—A witness testified over defendant's objection that a spark falling in chaff would, at first, burn slowly. *Held*, that it was unnecessary to consider the objection, as such testimony was afterwards, on defendant's motion, stricken from the record.

Same—Mortgagor as Plaintiff.—The fact that plaintiff had executed a deed of trust upon the barn before commencing such action did not disqualify him from maintaining it, he being in equity its real owner.

Same—Damages—Insurance.—The fact that plaintiff had the barn insured against fire at the time of its destruction could not be urged by defendant as a reason for a reduction of the damages to be paid by it.

Same—Contributory Negligence—No Defense.*—The law of Missouri makes the railroad company an insurer against loss by fires set by its locomotives; and contributory negligence of the owner in the lawful use of his property, short of fraud, furnishes no defense to such action.

Measure of Damages.—The measure of damages in such action was the value of the barn and its contents at the time of their destruction, and not the diminution of the market value of the farm upon which the barn had stood.

Same—Evidence.—And it was not error in such action to permit witnesses to testify as to the original cost of the barn, defendant having the right to show the difference in the cost and the depreciation in value by use and natural causes.

Same—Value of Property—Opinions as Evidence.—Nor was it error to permit witnesses who knew the barn, and were familiar with the cost of such buildings, to testify to its value, though the opinions of witnesses are not generally admissible as evidence.

Refusal of Continuance—Absence of Witnesses.—It was not prejudicial error in such action to refuse a continuance asked for upon

*See notes at end of case.

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the ground of the absence of certain witnesses, plaintiff having admitted that they would have testified had they been present, as defendant claimed.

Same—Plaintiff as Witness for Defendant.—Nor was the fact that plaintiff's deposition, taken prior to the trial at the instance of defendant, could not be found a sufficient reason for a continuance, plaintiff being present at the trial and available as a witness for defendant; it not being permissible to take the deposition of an adverse party for the purpose of forcing him to disclose the evidence on which he relies and the testimony he will give on the trial.

APPEAL by defendant from Clay county circuit court. *Affirmed.*

Elijah Robinson and Stewart Carkener, for appellant.

Warner, Dean; Gibson & McLeod and Stewart Taylor, for respondent.

MACFARLANE, J: This is an action under section 2615 of the Revised Statutes of 1889 of the state to recover damages for the destruction by fire of the barn of plaintiff and its contents, charged to have been communicated to them by sparks from one of defendant's engines. The damages claimed for the destruction of the barn is \$7,394.21, and for the loss of the contents, consisting of agricultural implements, grain, hay, etc., is \$5,042.70. The answer is: First, a general denial; second, contributory negligence; third, a plea in mitigation, on account of insurance collected by plaintiff an account of the loss; and, fourth, that the land was mortgaged as security for a debt, and the mortgagee was a necessary party. A jury trial resulted in a verdict and judgment for plaintiff for \$7,000, and defendant appealed.

It appeared from the evidence that plaintiff was the owner of a farm of about 1,000 acres in Jackson county, on the line of defendant's railroad. Plaintiff was a dealer in fine cattle, and the farm was used in his business. About the year 1887 plaintiff built on the farm, near Blue station, and within about 135 feet of defendant's railroad track and switches, a valuable barn, and thereafter used the same for sheltering his cattle and for storing feed and implements and machinery used

on the farm. In the second story of the barn, on the side next the railroad, plaintiff left an opening for the purpose of use in unloading and storing hay and other feed. This opening was provided with a door, which was generally kept closed. On the night of the 1st day of September, 1891, the barn and its contents were burned. The evidence, which was wholly circumstantial, tended to prove that the fire was started by a spark from one of defendant's engines being blown into the opening in the second story, the door of which plaintiff had neglected to close. Defendant offered evidence which proved that prior to the fire plaintiff executed and delivered to one Smart a deed of trust conveying to him the land to secure to one — the payment of certain notes therein described. The notes had not matured at the commencement of the suit, but before the trial they were paid by a sale of the land under the deed of trust. It was shown also that at the time the property was burned it was insured for the benefit of plaintiff, and that the insurance was afterwards paid to him.

At the request of plaintiff the court gave to the jury the following instructions: "(3) If the jury find from the evidence that plaintiff was the owner of the barn in controversy, and of its contents, and that they were destroyed by fire coming from an engine operated by defendant upon its railroad on the night of September 1, 1891, then the defendant is liable to plaintiff for the damage done, and although the engine may have been free from defects, and although there may have been no negligence in the management of the engine and train at the time of the fire. (4) If the jury find from the evidence that plaintiff had procured insurance upon the barn in controversy, and upon a portion of its contents, prior to the burning of the barn, and that after the burning of said barn he received certain moneys in settlement of said insurance, said insurance money so received cannot go to diminish the amount of plaintiff's claim, if any, against the defendant; but if the jury, under the evidence and instructions, find that

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defendant is liable to plaintiff for the burning of the barn and its contents, they must allow plaintiff the full amount of the injury done to his property, without regard to the amount of insurance money he received. (5) If it appears from the evidence that on or about the 6th day of January, 1891, the plaintiff conveyed the land upon which the barn in controversy was located to one David O. Smart as trustee, to secure certain notes due from plaintiff to one F. G. Farrell, and that after the fire in controversy said land was sold under said deed of trust, and the said notes paid in full out of the proceeds of the sale, then plaintiff's cause of action, if any, is not affected by the fact that said deed of trust was upon said land at the time said barn was burned. (6) Even if the jury should believe from the evidence that the windows or doors of plaintiff's barn were open, and that the fire caught from sparks that fell in the hay inside of said barn, that were thrown out by one of defendant's locomotives, yet the jury are instructed that the leaving open of said windows or doors was not such contributory negligence on plaintiff's part as will defeat a recovery by plaintiff, if you believe from the evidence and the other instructions given you that plaintiff is entitled to recover." "(8) The court instructs the jury that, if you find for the plaintiff, you will assess his damages at such sum as you may believe from the evidence the barn and its contents were reasonably worth on the 1st day of September, 1891; and if you believe from the evidence that a portion of said barn, or of its contents, was only partially destroyed by fire on said day, then you will allow plaintiff such sum on the property so partially destroyed as will reasonably compensate him for the loss thereby sustained, taking into consideration the value the property may have possessed for any purpose after its injury. But the jury will not allow anything for the Angus cow sued for, and in estimating the damage the jury will make no deduction on account of any insurance money received by plaintiff."

The court refused to give instructions 7 and 8 asked

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by defendant as follows : “(7) The court instructs the jury that the deed read in evidence in this case by the defendant vested in the grantee therein named the title to the real estate in question, together with the barn thereon, and placed him in possession thereof, and the plaintiff thereby became a tenant of said grantee ; and the court further instructs the jury that the plaintiff cannot maintain this suit as to the barn in question, regardless of whether the fire that destroyed the same escaped from one of defendant’s engines. (8) If the jury believe from the evidence in the case that the property in question was destroyed by fire by reason of any negligence and carelessness of the plaintiff, or any one in his employ at the time ; that such negligence and carelessness directly contributed to cause the fire ; and that, but for such negligence and carelessness, the fire would not have occurred,—then the plaintiff is not entitled to recover, regardless of whether the fire escaped from one of defendant’s engines. The court further instructs the jury that negligence and carelessness, as these terms are used in this instruction, means the failure to exercise such care and diligence as an ordinarily careful and prudent person would exercise for the preservation of his own property, under the same or similar circumstances.”

Section 2615 of the Revised Statutes of 1889 is as follows : “Each railroad corporation owning or operating a railroad in this state shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation, and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf, for its protection against such damages.”

1. A witness was permitted, on the trial, to testify to having seen, subsequent to the fire, a spark from an

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engine on defendant's road strike the center pole of a tent which had been erected on the site of the barn. It is objected that it was not first shown that the engine was of the same kind, or in the same condition, as the one from which alone the fire could have originated; nor was it shown that the condition of the weather or the direction and force of the wind was the same as it was on that occasion. This objection is fully answered in the opinion in *Campbell v. Railway Co.*, 121 Mo. 349, 25 S. W. 936, in which it was held that the evidence was competent, as tending to prove the possibility, and consequent probability, that the fire was communicated to plaintiff's property by sparks from one of defendant's engines. The probative force of the evidence was for the jurors, in a determination of which they had the right, and it was their duty, to consider the differences in the conditions of the engines and of the weather.

2. A witness testified over defendant's exception that a spark falling in chaff would, at first, burn very slowly. This evidence, on motion of the defendant,

Same. was afterwards stricken from the record, on the ground that the question as to how chaff

would burn was a matter of common observation, and was not, therefore, a proper subject for expert testimony. This action of the court relieves us of the necessity of a consideration of the question. If defendant had desired to have the evidence more specifically excluded, an instruction to that effect should have been requested.

3. Prior to the burning of the barn, plaintiff had executed and delivered to one Smart a deed of trust on the farm upon which it stood as security for a note to a third person for a large amount. The note had not

Same—Mortgagor as Plaintiff. matured at the time this suit was instituted, but had been paid, by a sale of the farm, before the judgment herein was rendered.

By the terms of the deed of trust, plaintiff was permitted to remain in possession of the farm until condition broken, without the payment of rent, but agreed, after

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condition broken, to deliver possession thereof, on demand, to the trustee. Under this state of facts defendant asked, and the court refused to give, instruction 7 set out fully in the statement. There can be no doubt, under the decisions of this court, that a trustee in a deed securing a debt takes the legal title to the land, and, on condition broken, is entitled to the possession thereof. *Bowlin v. Furman*, 28 Mo. 427; *Thresher Co. v. Donovan*, 120 Mo. 423, 25 S. W. 536, and cases cited. But, even after condition broken, the trustee in possession holds the legal title in trust for the grantor, and a payment of the debt before foreclosure defeats the deed, and the legal title is at once invested in the grantor. *Hudson Bros. Commission Co. v. Glencoe Sand & Gravel Co.* (Mo. Sup.; not yet officially reported) 41 S. W. 450. While, therefore, the legal title is vested in the trustee, it is held merely in trust as security, and the beneficial interest remains in the grantor subject to the payment of the secured debt. The deed of trust, then, is really a mere security, and an injury to the freehold is a damage to the grantor, who is, in equity, the real owner, and he is at least a proper party to a suit to recover compensation therefor. It is unnecessary to inquire, in this case, whether the trustee was a necessary party to the suit when instituted, for the secured debt was paid before the trial, and the trustee, at that time, at least, was neither a necessary nor a proper party. Plaintiff, as the substantial owner of the farm when the barn was burned, was the real party damaged. Neither the trustee nor the secured creditor are complaining, and we are unable to see that defendant, who is in no wise interested in the deed of trust, has a right to complain after satisfaction of the debt. If defendant is liable for the damages, there can be no difference to whom it is paid, if payment discharged the liability and is a bar to an action by another party.

4. At the time the barn was burned, plaintiff had it insured in his own name, and for his own benefit. This

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insurance he afterwards collected. Defendant insists that the damage for the loss of the barn should be reduced by the amount paid plaintiff by the insurance company. The argument is that it would be unreasonable to allow plaintiff to collect from defendant the full amount of damages for his loss after having already received partial indemnity from the insurance company. While at first thought the argument appears plausible, the principle invoked here has, after careful consideration and sound reasoning, been disapproved by several decisions of this court. *Mathews v. Railway Co.* (Mo. Sup.) 24 S. W. 591, and cases cited. Under these decisions it is held that a party will not be allowed indemnity for his own wrong under a contract to which he is not a party, and in which he has no interest. The insurance money in this case was not paid in satisfaction, in whole or in part, of defendant's liability. Defendant is liable for its wrongful act, and has no concern whether the damages are paid to plaintiff or to the insurance company. That question is between the parties to the contract of insurance, and is not in issue in this case. That defendant had the right to protect itself by insurance in its own name does not affect, in the least, the principle involved. Though it neglected to avail itself of the right conferred upon it by the statute, yet it has no more right to claim the benefit of plaintiff's contract with the insurance company, made for his own protection, and for which he paid, than it would have to claim under the same contract had it no insurable interest in the property. In either case, the contract is between the owner and the insurance company, and is not for the benefit of a third person, whose negligent or wrongful act caused the injury.

5. The court refused at request of the defendant to instruct the jury that, if the property in question was destroyed by fire by reason of the negligence of plaintiff, or any one in his employ, which negligence directly contributed to cause the fire, and that without such negligence the fire would not have occurred, then the

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verdict should be for the defendant. The only negligence ascribed to the plaintiff is that of permitting the door in the second story of the house to remain open. Defendant insists that if such an act was negligent, and directly contributed to start the fire, it would bar a recovery. The question then fairly raised by the instruction is whether, under the statute in question, the contributory negligence of the landowner, in the control and management of his property, constitutes a defense to an action for damages caused by such fires. In *Mathews v. Railway Co.* it was said by GANTT J., who wrote the opinion, that "by virtue of section 2615 the defendant is made an insurer against fire set out by its engines, and it is a familiar rule that contributory negligence short of fraud does not furnish any defense to an action by the insured on his policy of insurance." Counsel admits that this statement, as a legal proposition, authorized the refusal of the instruction asked, but he says the statement was not necessary to a decision of the case, and was, therefore, a mere dictum of the judge who wrote the opinion, and is not, therefore, an authority for the correctness of the principle of law announced. That was also a suit under section 2615 of the Revised Statutes of 1889. Defendant undertook to prove, as a defense to the action, that plaintiff had negligently permitted dry grass and weeds to accumulate on his property adjacent to the railroad, by means of which the fire was started, and communicated to his buildings. The learned judge pointed out that under the rulings of this and other courts it was not contributory negligence in a farmer "to permit dead and dry grass to remain in his field adjoining the right of way, especially when there was no evidence that this is out of the usual course of husbandry." But the action in that case was not for negligence, but under a statute which makes railroad companies absolutely responsible in damages for property destroyed by fire communicated directly or indirectly, by engines in use upon their roads. The concluding paragraph of the opinion above quoted was, therefore, a direct decision of the question in-

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volved in this case, namely, that contributory negligence as a cause of the fire cannot be pleaded as a defense to an action under this statute. It is true, the court might have rested its decision alone on the fact that no contributory negligence was shown; but it did not do so, and we must take what was there said as a decision of the question involved in this case. The inquiry then is, was the statute, so far as it affects the question of contributory negligence, correctly interpreted by the opinion delivered in the Mathews Case? The importance of the question involved, and the respectful earnestness of counsel in his argument against the rule declared in that case, have induced us to give it a careful reconsideration. The statute imposes upon railroad companies an absolute liability for all damages caused by fires communicated, directly or indirectly, to the property of others, by locomotive engines in use upon railroads owned or operated by them. There is no exception or qualification to this liability. The statute declares an absolute rule of law in respect to which party shall suffer the loss occasioned by such fires. The courts have no right to add to the plain language of the statute an important and far-reaching exception, limiting the liability to the care the owner has taken to protect his property from the wrongful acts of railroad companies. The damage resulting from such fires must fall either upon the company, whose engine starts it, or upon the person whose property is destroyed. The statute fixes the liability, and justly, upon the one who puts in motion the dangerous and destructive element. The rule of contributory negligence is not founded upon any inviolable right, but was established by the courts as the most reasonable and just, in view of the impossibility of measuring what part of the damage is attributable to the negligence of the respective parties. As has been said: "The law has no scales to determine in such cases whose wrong weighed most in the compound that occasioned the mischief." *Railroad Co. v. Norton*, 24 Pa. St. 469. A party having no natural or constitutional right to avoid the consequences of his own wrongful or negli-

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gent act on the ground that the concurring negligence of the party who suffered the injury contributed to cause it, there can be no doubt that the legislature had the power to change the rule, and place the responsibility for damage by fires upon the party who wrongfully started them, regardless of the care the owner may have exercised in the use and management of his property, short of intentional exposure or other fraud. The statute also gives the railroad company protection by authorizing them to insure the property along the route of their railroads against damages caused by fires communicated by their own engines. In case this barn had been insured by defendant, the insurance company could not have defended an action for damages on its contract of insurance on the ground that the negligence of the plaintiff had contributed to cause the fire. The railroad company could, according to the argument of counsel, collect the damages from the insurance company, and then defeat an action by the property owner. Such a result would be unreasonable, and could not have been intended. If the terms of the statute were open to interpretation, the intent to impose an absolute liability clearly appears from this authority to insure. Elliott in his late work on Railroads, says: "Where there are statutes in force imposing liability upon a railroad company for fires set by its locomotives, the question of the owner's contributory negligence is immaterial, and has no effect on his right to recover." Volume 3, § 1238. The cases cited fully sustain the text. *Laird v. Railroad Co.*, 62 N. H. 254; *West v. Railway Co.*, 77 Iowa, 654, 35 N. W. 479, and 42 N. W. 512; *Rowell v. Railroad Co.*, 57 N. H. 135. Statutes of many states require railroad companies to fence their roads in order to prevent cattle from trespassing upon the tracks, and declare them absolutely liable for all stock killed or injured by locomotives and trains in case fences have not been built. In suits for damages under these statutes it is generally held that negligence of the owner in permitting his stock to run at large in the vicinity of the unfenced railway is immaterial, and constitutes no defense. Beach

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Contrib. Neg. c. 9, and cases cited ; 3 Elliott, R. R. § 1209, and cases cited. Under such a statute it is held in this state that an owner of cattle killed on a railroad is not guilty of contributory negligence in pasturing them on his own land, though he may be aware of the defective condition of the railroad fence. *Donovan v. Railroad Co.*, 89 Mo. 147, 1 S. W. 232. Counsel cites, and largely relies upon, the decisions of this court in actions for damages caused by the violation of a statute requiring signals of approaching trains to be given at railroad crossings, in which it is held that, notwithstanding the default of the railroad company in respect to giving the required signals, the contributory negligence of the injured person will defeat a recovery. *Rev. St. 1889, § 2608 ; Weller v. Railway Co.*, 120 Mo. 653, 23 S. W. 1061, and 25 S. W. 532, and cases cited. The statute cited, after requiring the signals to be given, provides : “And said corporation shall also be liable for all damages which any person may hereafter sustain at such crossing when such bell shall not be rung or such whistle sounded, as required by this section ; provided, however, that nothing herein contained shall preclude the corporation sued from showing that the failure to ring such bell or sound such whistle was not the cause of such injury.” *Rev. St. 1889, § 2608.* It is very evident that the statute, as qualified and limited by the proviso, was only intended to create a *prima facie* liability on proof of a failure to give the signals, and that injury was sustained. It leaves open to the corporation the right to prove, as a defense, where the responsibility for the damages rightfully belongs. The rulings of this court in cases arising under the damage act (*Rev. St. 1889, § 4425 et seq.*) have no application to suits for damages under the act in question, for the reason that under the former statute negligence is the foundation of the action. As held in the Mathews Case, the effect of the fire statute is to make the railroad company an insurer against loss by fire communicated by its locomotive, and contributory negligence of the owner in the lawful use of

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tory Negligence—
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his property, short of fraud, furnishes no defense to the action.

6. The court instructed the jury, in effect, that, in case they found for plaintiff, they should assess his damages at such sum as they should believe, from the evidence, the barn and its contents were reasonably worth at the time they were destroyed. Defendant insists that the rule so given by the court for measuring damages was improper, as applied to the loss of the barn. Counsel insists that the destruction of the barn was an injury to the freehold, and the correct measure of damages is the difference in the value of the real estate just before and just after the property was burned. "The general principle," says Sedgwick, "upon which compensation for injuries to real estate is given, is that the plaintiff should be reimbursed to the extent of the injury to the property. The injury caused by the defendant may be of a permanent nature. In such case the measure of damages is the diminution of the market value of the property." Sedg. Dam. § 932. The same rule has been applied as affording the measure of damages when ornamental or fruit-bearing trees have been destroyed. Id. § 933, and cases cited. Shannon v. Railroad Co., 54 Mo. App. 223. But we think this rule, in order to reach just results, can generally be applied only to cases in which the injury is done to the real estate itself, as distinguished from injury or destruction of what may be erected or grown upon it, as fences, buildings, crops, etc. In such case the owner is entitled to reimbursement for the loss he suffers, and it is very manifest that the difference between the value of the real estate before and its value after the injury would not generally afford a fair rule for measuring the damages. It might often happen that a certain character of building would add nothing to the market value of the real estate upon which it is situated. For example, a cheap dwelling house, on a valuable lot in a business block, would possibly depreciate the salable value of the lot to the extent of the cost of removing it, yet it could not be fairly said that the house had no value, though it added

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nothing to the market value of the lot. The owner has the right to use his real estate in any lawful manner he may wish, and, if the improvements he has chosen to erect upon it are destroyed by another, he is entitled to reimbursement for the loss he suffers. No rule is just which does not afford to the injured person fair compensation for the loss or damage he has sustained. If the building destroyed, although a part of the realty, has an ascertainable value, we can see no fairer rule for ascertaining just compensation for its loss than that given the jury in this case. The value of the barn in its condition as it stood upon the farm before its destruction is the loss plaintiff sustained, and for which he is justly entitled to compensation. The jury, it is true, might have been required to ascertain the value of the barn with reference to its condition, locality, and the uses to which it could have been applied in connection with the farm, yet the generality of the instruction does not constitute reversible error. The special matters were included under the general language used, and we ought to presume that they were taken into consideration by the jury. If defendant thought the instruction too general, and left the jury too much latitude, it should have asked more specific instructions. *Browning v. Railway Co.*, 124 Mo. 55, 27 S. W. 644. For the purpose of ascertaining the value of the barn at the time of its destruction, plaintiff was entitled to put the jury in possession of all the facts bearing upon the question. There was, therefore, no error in permitting witnesses to testify to the original cost, though materials should then have been more costly than when the building was burned. Defendant had the right to show the difference in the cost and the depreciation in value by use and natural causes. There was no error in permitting witnesses who knew the barn, and were familiar with the cost of such buildings, to testify to its value. Generally, the opinions of witnesses are not evidence, but there are exceptions to the rule. "The case of the value of property forms one of the admitted exceptions, and the opinions of witnesses

Same—Evidence.

Same—Value of
Property—Opinions
as Evidence.

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are admitted as to the value of property." Thomas v. Mallinckrodt, 43 Mo. 65, and cases cited.

7. Before the trial commenced, defendant applied for a continuance, which was refused. The motion for a continuance was supported by affidavit. The absence of two witnesses, Moran and Applegate, and the loss of the deposition of plaintiff, Refusal of Continuance. which had been taken by defendant, were

the grounds upon which the continuance was asked. Plaintiff admitted that the witnesses Moran and Applegate, if present, would swear to the facts set out in the affidavit, and such facts were read by defendant on the trial as the testimony of Moran, and Applegate was present at the trial, though not called as a witness. There was, therefore, no prejudicial error in refusing a continuance on account of the absence of these two witnesses, at the time the application was made. It appears from the affidavit that some time before the trial defendant took the deposition of plaintiff, and had the same filed as a deposition in the cause. When the trial came on, this deposition could not be found. The facts stated in the affidavit tended to prove that the deposition, when last heard of, was

in the possession of plaintiff, and that de- Same - Plaintiff as Witness for Defendant. fendant was in no way responsible for its

loss. The affidavit states as ground for a continuance: "The deposition of plaintiff, which is missing, was taken several months ago, and is quite lengthy, containing about twenty-five pages of typewritten testimony, to the best of the recollection of defendant's attorney. In said deposition said Matthews testified very fully about the matters involved in this case, and it is utterly impossible for defendant's attorney to remember the statements made by said plaintiff in said deposition. It is very important that defendant should have said deposition in the trial of this case, and it cannot try said case as well without as with said deposition; and, if it be forced to try said case without said deposition, it may thereby suffer a wrong and an injustice." Plaintiff was present when the continuance

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was applied for, and, indeed, testified in his own behalf, as a witness at the trial. Section 8920 of the Revised Statutes of 1889 gives a party to a civil action the right to compel the adverse party to testify as a witness in his behalf in the same manner, and subject to the same rules, as other witnesses. It is insisted that under this provision of the statute one party to a suit "is entitled to know what his adversary's knowledge and information is, bearing on the case, and what his testimony will be in regard to the issues involved," and is also entitled to get at it in the shape of a deposition, and "have the deposition before him for such practical use as may be made of it on the trial of the case." There is no doubt the statute is often used for the practical purposes suggested, but we do not feel ourselves justified in going outside of the statute for its reasons when they sufficiently appear therein. At common law, and under the Missouri statutes in force when this provision was enacted, a party was not a competent witness, though under the chancery practice he could be required to make answer to such interrogatories as the opposite party might propound to him. It is said that this section was probably designed as a substitute for this ancient chancery practice. *Eck v. Hatcher*, 58 Mo. 235. This may have been the purpose, yet we must give effect to the statute as we find it written. The original intention evidently was to allow one party to make a witness of his adversary who was incompetent to testify in his own behalf. He could compel the adverse party to testify in his behalf, but by doing so he made him a competent witness, who might be examined by the opposite party "under the rules applicable to the cross-examination of witnesses." *Ess v. Griffith* (Mo. Sup.) 40 S. W. 930. The statute remains unchanged, though under the present law parties to suits are, with some exceptions, competent to testify as witnesses in their own behalf. "A party to a suit is a competent witness for himself, and may be called as a witness by his adversary, and stands precisely as any other witness, in relation to that suit."

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Ex parte Priest, 76 Mo. 235. A party, when he takes the deposition of his adversary, must do so with the purpose of using it as evidence at the trial. This is the manifest intent of the statute. When taken and filed, it becomes a deposition in the case, and nothing more. The statute cannot be tortured into meaning that the deposition of an adverse party may be taken for the purpose of forcing him to disclose the evidence on which he relies, and the testimony he will give on the trial. The deposition could not have been read as such, for the plaintiff was present; nor did defendant state, in his affidavit for a continuance, that the deposition contained admissions of plaintiff which he wished to read as evidence against him. The loss of the deposition was, therefore, no cause for continuance. The trial seems to have been fair throughout, the verdict is amply supported by the evidence, and the judgment is affirmed. All concur.

NOTES.

Fires Set by Locomotives—Contributory Negligence.—As to constitutionality of statutes making railroad companies liable for all damages by fire, see *St. Louis & S. F. R. Co. v. Mathews*, 6 Am. & Eng. R. Cas. 361 and *note* 387.

The property owner must be free from contributory negligence. *Martin v. New York & N. E. R. Co.*, 56 Am. & Eng. R. Cas. 79, 62 Conn. 331, 25 Atl. Rep. 239.

The fact that a person's property is exposed to the reach of sparks of a locomotive engine is no defense to an action for an injury occasioned by the railroad company's negligence in setting out fire. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 Am. & Eng. R. Cas. 603, 27 Fla. 1, 9 So. Rep. 661. *Philadelphia & R. R. Co. v. Hendrickson*, 80 Pa. St. 182.

In an action under Colo. Gen. St. § 2798 the doctrine of contributory negligence cannot be invoked by the defendant. *Union Pac. R. Co. v. Arthur*, 2 Colo. App. 159, 29 Pac. Rep. 1031.

Under Iowa Code, § 1289, a railroad company cannot escape liability for negligently setting out a fire on its right of way, whereby an adjoining owner sustains damage, by showing that the plaintiff was guilty of contributory negligence in exposing his property. *West v. Chicago & N. W. R. Co.*, 38 Am. & Eng. R. Cas. 340, 77 Iowa 654, 35 N. W. Rep. 479, 42 N. W. Rep. 512. *Johnson v. Chicago & N. W. R. Co.*, 77 Iowa 666, 42 N. W. Rep. 512.

In an action to recover for an injury caused by a fire set out by a locomotive the court instructed as follows: "If plaintiff's own neg-

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ligence directly and proximately contributed to his own injuries, then he cannot recover; but in order to defeat his right of recovery, there must be such contributory negligence on his part as directly and proximately contributed to produce the injuries, and without which his loss would not have been sustained." *Held*, that while the last clause of the instruction may not express the rule as settled by the holdings of this court, it could not have prejudiced defendant, since it was held in *West v. Railway Co.* (77 Iowa 654), that under section 1289 of the code, the right of recovery in a case of this kind would not be defeated by the mere contributory negligence of the injured party. *Engle v. Chicago, M. & St. P. R. Co.*, 77 Iowa 661, 37 N. W. Rep. 6, 42 N. W. Rep. 512.

The Vermont statute, which provides that "when any injury is done to a building or other property by fire communicated by a locomotive engine of any railroad corporation, the said corporation shall be responsible in damages for such injury, unless they shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury," imposes a more stringent liability than the common law; and in an action brought in New Hampshire to recover damages for injury caused to personal property by fire from a railroad locomotive in Vermont, the liability of the railroad is determined by the law of Vermont, and the doctrine of contributory negligence does not apply. *Laird v. Connecticut & P. R. R. Co.*, 43 Am. & Eng. R. Cas. 63, 62 N. H. 254, 13 Am. St. Rep. 564.

Plaintiff's Duty to Guard Against Fires, Generally.—No obligation rests upon the owners of property along a track to keep it in a condition to be always safe from fires thrown from passing engines. *Richmond & D. R. Co. v. Medley*, 7 Am. & Eng. R. Cas. 493, 75 Va. 499; *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 299, 14 Am. Ry. Rep. 226.

Farmers may cultivate and use their farms and improvements as is customary among farmers, and are not bound to exercise unusual means to guard against fires by railroad companies. *Philadelphia & R. R. Co. v. Hendrickson*, 80 Pa. St. 182.

One who builds a hotel near a railroad track assumes the hazards connected with the use of the railroad, and must use a higher degree of care in providing means to protect his property from fire than a person in a less exposed position. *Chicago & A. R. Co. v. Pennell*, 94 Ill. 448.

Where property is situated near a railroad track so as to be constantly exposed to fire from passing trains, the owner must use such care for its protection as prudence would dictate under the circumstances. *Collins v. New York C. & H. R. R. Co.*, 5 Hun (N. Y.) 499; affirmed in 71 N. Y. 609.

A person maintaining a warehouse near a railroad track is only bound to exercise ordinary care and prudence under the circumstances to avoid fire; hence it is error to instruct the jury that he must keep the warehouse in such condition as very prudent and cautious men would generally keep their own property under like circumstances. *Ward v. Milwaukee & St. P. R. Co.*, 29 Wis. 144, 12 Am. Ry. Rep. 193.—*Modifying Potter v. Chicago & N. W. R. Co.*, 21 Wis. 372; *Dreher v. Fitchburg*, 22 Wis. 675.

It is error to refuse to instruct that a person owning property contiguous to a railroad has a right to continue to use the property

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after the railroad has been built, in the same manner as before, if he takes reasonable care to prevent or extinguish fires. *Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co.*, 54 Am. & Eng. R. Cas. 512, 70 Miss. 119, 12 So. Rep. 156.

A plaintiff is only bound to use ordinary care to extinguish or prevent the spread of a fire started by a railroad company, and he is not bound to use extraordinary means to do so. *Bevier v. Delaware & H. Canal Co.*, 13 Hun (N. Y.) 254.

A landowner near a railroad track is only chargeable with contributory negligence where the danger of fire from locomotives is seen—that is, where a fire has already been started—and he fails to do what prudence requires to stop the fire, or what is some act inconsistent with the preservation of his property; but he is not chargeable with contributory negligence for a danger that is unseen, but which might be anticipated, in which case he is not bound to provide against probable fires, or refrain from using his property in the ordinary way, if that be prudent. *Snyder v. Pittsburgh, C. & St. L. R. Co.*, 11 W. Va. 14; *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223, 2 Am. Ry. Rep. 483.

Contributory negligence as a defense where a company is sued for destroying property by fire, see *note* 38 Am. Dec. 74. See also 35 Am. & Eng. R. Cas. 245 *abstr.*

Contributory negligence in failing to protect property, see *note*, 47 Am. & Eng. R. Cas. 691.

RICHMOND *et al.*

v.

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(*Supreme Court of Oregon, July 31, 1897.*)

Fires Set by Locomotives—Contributory Negligence—Due Care by Plaintiff's Employees.—The failure of an agent in charge of property threatened with destruction by fire to make a reasonable effort to save it is the failure of the principal, but an agent, in the absence of his principal, cannot be expected to exert the same degree of care for the protection of property over which he has no control, as for the protection of that under his immediate charge.

Same—Non-Suit—Question for Jury.—It was error to give a judgment of non-suit upon the ground of contributory negligence on the part of plaintiff's employee in not sufficiently exerting himself to prevent the destruction of the property by fire, where it appeared from the evidence that the agent made some effort to perform his duty in this respect, whether or not he fully performed such duty being a question of fact for the jury.

Same—Accumulation of Grass on Right of Way—Negligence*—Question for Jury.—Where a railroad company suffers dry grasses

*See notes at end of case.

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and other inflammable material to accumulate on its right of way, and it is found to be on fire within 5 minutes after the passage of a train, and there is evidence tending to show that the fire could not have originated from other causes, and such fire spreads and destroys adjoining property, it is for the railroad company to rebut the presumption that the fire originated through its negligence.

APPEAL by plaintiff from Union county circuit court. *Reversed.*

This is an action by F. L. Richmond and W. T. Wright against E. McNeill, as receiver of the Oregon Railway and Navigation Company, a corporation, to recover damages for injury to land belonging to them in Union county, Or., by the burning of the soil thereof and the grass, fence-posts, and wire thereon, the destruction of which is alleged to have been caused by the negligent operation of a railway locomotive on the line of said company. whereby sparks were emitted therefrom, which, falling upon a quantity of dry grass and other inflammable material, carelessly permitted by the defendant, his agents and servants, to accumulate on the right of way of the railway company, caused the same to ignite, and the fire kindled thereby spread to plaintiff's adjoining premises, causing the injury of which they complain. The complaint is in the usual form, and, issue being joined thereon, at the trial the plaintiffs introduced their evidence, and rested, whereupon the court, considering that neither the plaintiffs nor their agents had exercised such a degree of care and diligence in protecting their property from the ravages of the fire as was reasonably within their power, upon motion therefor gave a judgment of nonsuit, from which the plaintiffs appeal.

Geo. E. Chamberlain, for appellants.

J. M. Long and *T. H. Crawford*, for respondent.

MOORE, C. J. (after stating the facts). The judgment complained of was evidently based upon the assumption that, although the fire which caused the injury was negligently emitted from a locomotive,

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and, communicating with the dry grasses and other inflammable materials which were carelessly permitted to accumulate on the right of way, spread therefrom, and burned the plaintiffs' property, yet that, by the exercise of reasonable care and diligence on their part, the injury of which they complain might have been averted. An examination of the evidence adduced by plaintiffs tends to show that on October 25, 1895, they were the owners and in the possession of 650 acres of peat land, covered with rank grasses and tules, the soil of which was composed of combustible material, easily ignited; that the line of the railway of the said corporation runs across this land, and that on October 25, 1895, between 6 and 7 o'clock in the morning, a freight train going east passed over the same, and soon thereafter one S. P. Gates, an employee of the plaintiffs, who was about three-quarters of a mile therefrom, discovered smoke ascending from what he supposed to be the right of way through the land in question. Gates testified that within 5 minutes after the train passed he saw smoke, which he watched for about 10 or 15 minutes; that he then went into the house to give the alarm of fire, where he remained about five minutes; he thereupon went to the barn to hitch up a team, which occupied about 10 minutes, and, neither of the plaintiffs nor their superintendent being present, he, in company with his wife, two children, and another employee, drove to the fire, to see if they could do anything to guard the property; that it required about 10 or 15 minutes to make the journey, and upon their arrival they went along the water ditch on the premises to see that the fire did not cross it into the land lying on the opposite side, but, having no means with which to combat the fire, and believing that it would be useless to attempt it even if they were supplied therewith, they made no effort in that direction. This witness also says that he saw the section men going west that morning; that they met the freight train at plaintiffs' land, where they removed their hand car from the track, to allow the train to

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pass, after which the car was replaced, and they resumed their journey. Alexander Ferguson, another witness, who lived about two miles from the scene of the fire, saw the train pass, and soon after passing plaintiff's land, he saw smoke, which he thought might have been caused by section men burning railroad ties. From this evidence, can it be said that plaintiffs' agents did not exercise that degree of care and diligence which it was possible for them to exert in protecting the property from destruction? The rule is settled in this state that if a party, by slight effort, and without danger, could have avoided the destruction of his property by fire negligently set by another, and refuses to put forth a reasonable exertion to arrest the impending injury, such failure on his part will preclude his right of recovery. *Eaton v. Navigation Co.*, 19 Or. 391, 24 Pac. 415. In *Railroad Co. v. McClelland*, 42 Ill. 355, the court, upon defendant's request, refused to give the following instruction: "If the son and servant of the plaintiff saw the fire in time to put it out, while it was on the right of way, before it reached the plaintiff's meadow, it was his duty to do so. And if, through his negligence in not doing so, the fire consumed the property of the plaintiff, the defendant would not be liable therefor." And, judgment having been rendered in favor of plaintiff, it was reversed on appeal; BREESE, J., in rendering the decision of the court, saying: "It was, then, a proper subject of inquiry by the jury, could the plaintiff's son and servant, by the exercise of reasonable diligence, have prevented the spread of the fire? He saw the fire in time to arrest its progress, or, at any rate, in time to make some effort to that end, but did not choose so to do. He left the scene, and was absent nearly one hour, and on his return the fire had reached the meadow. Common prudence required he should have made some effort to prevent this, and it was negligence on his part, for which the plaintiff is answerable, that he did not. The fire in the meadow in July may be charged to the negligence of the plaintiff's son,

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who was in a position to have prevented it. The court should have given this instruction to the jury, and it was error to refuse it." In the absence of the principal, it has been held that it is the duty of the agent or employee engaged with reference to the care or management of any property that is threatened with destruction by fire caused by the negligence of another to make a reasonable effort to avert the injury, and the neglect of the agent or employee in this respect is the failure of the principal. *Railway Co. v. Hecht*, 38 Ark. 357. It would seem that the rule announced in this case is correct upon principle, but it cannot reasonably be expected that an agent or employee engaged in another branch or department of the principal's service would exert that same degree of care and protection of property over which he had no control, and in which he had but little interest, as he would over that under his immediate charge, and particularly so when the destruction of the latter class of property might mean a loss of employment. Nor can it be expected that a servant, in the absence of his master, can have the same interest, or exercise a like degree of care, in protecting from destruction property over which he has control as is to be looked for in the owner; but he must, it would seem, make some effort in that direction. *Whart. Neg.* (2d Ed.) par. 877. The evidence shows that plaintiffs' superintendent, being obliged to leave the place, appointed Gates to look after it in his absence, and this would doubtless demand of him, in the protection of the property from the ravages of the fire, a degree of care commensurate with his responsibility.

Fires Set by Locomotives—Contributory Negligence—Due Care by Plaintiff's Employees.

Having shown that a duty devolved upon Gates by reason of his employment, we will review the evidence, together with the reasonable inferences deducible therefrom which tend to show the manner in which he discharged his legal obligation. It will be admitted that fire is a destructive agent, and, ordinarily, he who would avert the effect of its devastation of inflammable property

Name—Contributory Negligence—Question for Jury.

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must act promptly upon the discovery of the danger. Applying this rule, which would appear to be just and reasonable, to the acts of Gates, it will be remembered that, after discovering the smoke on what he supposed to be the right of way, he watched it for about 10 or 15 minutes before he made any effort towards preventing a spread of the fire if it were imminent. He saw the section men, when the freight train met them, at a point on the line at which the fire thereafter started ; and while he does not testify that he thought the smoke was caused by a fire set by these men to burn railroad ties, Ferguson, another witness does, although the latter was two miles from the scene of the fire, while Gates was only three-quarters of a mile distant. The jury might reasonably have inferred that Gates did not conclude that there was any danger from the fire, the smoke of which he saw ; and, such a conclusion being deducible from the fact of his observation, the reasonable period of it before he became convinced that the danger was imminent must necessarily have been a question of fact for the jury to ascertain. So, too, the time spent in giving information of the fire, hitching up a team, and making the journey is reasonable, or might be so found by a jury. At least the court could not say, as a matter of law, that the time thus consumed was unreasonable. Gates also says that his object in going to the fire was to see if anything could be done to guard the property, upon arriving at which they went along the water ditch to prevent the fire from crossing it, but that, having no means, they made no effort to ; and, if they had tried, they could not have put out the fire. The failure of an owner of property to protect it from destruction by fire when it is within his power to do so with reasonable effort and without danger, thereby precluding his right of recovery for the damages resulting therefrom in case of its loss, must necessarily rest on the doctrine of contributory negligence. The danger incident to the fire, and the effort, when any has been made by the owner of the property, to prevent its destruction, are facts which it

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is within the sole province of the jury to determine, unless the court can say, as a matter of law, that there was no apparent danger and no reasonable effort. The editor of the American and English Encyclopedia of Law (volume 4, p. 94), announcing the rule for determining whose duty it is to measure the degree of care demanded of the owner in such cases, says: "When the facts are disputed, or more than one inference can be fairly drawn from them as to the care, or want of care, of the plaintiff, the question of contributory negligence is for the jury; but when the facts are undisputed, and but one inference regarding the care of the plaintiff can be drawn from them, the question is one of law for the court." "Negligence as I understand it," says COOLEY, C. J., in *Railroad Co. v. Van Steinburg*, 17 Mich. 99, "consists in a want of that reasonable care which would be exercised by a person of ordinary prudence under all the existing circumstances, in view of the probable danger of injury." The learned justice and text writer elsewhere in the opinion also says, "As a general rule, it cannot be doubted that the question of negligence is a question of fact, and not of law," and cites many cases in support of this proposition. Applying these rules to the conduct of Gates on the occasion of the fire, we think it cannot be said that the only inference deducible therefrom is that he made no reasonable effort to prevent the spread of the fire, or to mitigate the threatened injury. It appears from the evidence that he went with reasonable diligence to the scene of the fire, ready and willing to do what he could, as he says, "to guard the property"; and that he passed along the water ditch several times to see that the fire did not cross it conclusively shows that he made some effort to perform his duty, the degree of which must be a question of fact peculiarly within the province of a jury to ascertain, and by their verdict to say whether his endeavor was all that could have been reasonably performed, and, such being the case, the judgment of nonsuit cannot be sustained upon that ground.

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2. It is contended, however, by counsel for defendant, that, plaintiffs having failed to offer any evidence tending to show that the fire was set by sparks emitted from the locomotive in question, or that it was sending out sparks, cinders, or great volumes of smoke on that day, or that it or any other engine had ever done so in that vicinity, or that the track at that place was up grade, the freight train long or heavily loaded, or that the engine was working hard, or that it was faulty in construction, defective in appliances for arresting sparks, or carelessly or negligently operated, or any other facts from which an inference might be deduced that the fire which caused the injury originated from a spark or cinder emitted from the locomotive attached to the freight train, the judgment of nonsuit was properly rendered; while counsel for plaintiffs maintain that, having given evidence tending to prove that the defendant negligently permitted dry grass and other inflammable material to accumulate on the right of way, which were ignited immediately after the train passed their premises, and also that the fire which destroyed their property could not probably have originated from any other source, raised such an inference that the fire was caused by a spark emitted from the locomotive as to impose on the defendant the burden of proving that the engine in use on that day was properly constructed, possessed proper and modern appliances for confining sparks and cinders, and was carefully operated by skilled and prudent employees, and hence a judgment of nonsuit could not be predicated upon this ground. Reviewing the evidence offered on this branch of the subject, it tends to show that the witness Gates first saw the freight train that morning at a point about 150 or 200 yards west of where the fire thereafter started; that he also saw the section men going west on a hand car, which they removed from the track to permit the train to pass, after which they replaced the car, and resumed their journey; that just after the train passed, and while it was still in view of this witness, and

Same—Accumulation of Grass on Right of Way—Negligence—Question for Jury.

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within five minutes after the section men passed the point where the fire appeared, he discovered the fire ; and that, in his opinion, and to the best of his knowledge, it started on the right of way. He also says that the weather was dry, that defendant had permitted dry grass to accumulate on the right of way, and that there had been no other fire in that vicinity that fall. The witness Ferguson says that from his place, which is about two miles west of where the fire started, he had a fair view of the railway track, and on that morning saw the train, which at that time of the year he generally watched pretty close ; that he did not see it set any fire, and thought he was free therefrom at that time, but that in a little while after it passed he saw smoke arising at a point which appeared to him to be right at the railroad where it passes through plaintiffs' premises, and he then thought it might have been caused by men at work burning ties. The witness Van Gates, the plaintiff's superintendent, also says that defendant's employees dumped off grass and weeds about four or five feet from the ends of the ties along the railway track across the premises in question. From the *resume* of the evidence applicable to the question involved, can it be fairly said that it was sufficient to raise an inference from which the jury might reasonably find that the fire originated from a spark emitted from a locomotive attached to the freight train ? "The doctrine," says SHERWOOD, J., "is now very well settled, and we think correctly, that a railroad company must keep its right of way reasonably clear of dangerous combustible matter ; and, if a fire occurs in consequence of a negligent failure so to do, and damages therefrom ensue to the property of another, the company will be liable therefor." *Jones v. Railroad Co.*, 59 Mich. 437, 26 N. W. 662, citing a long list of authorities. See, also, 8 Am. & Eng. Enc. Law, p. 14, in which a contributor, announcing the reason for this rule, says : "The general rule is that a railway company must keep its track and right of way clear of all such substances as are liable to be ignited by sparks

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or cinders from its engines. This is a duty clearly implied in the grant or charter which confers the right to use steam engines. As fire is a dangerous agent, it is but reasonable to presume that the legislature in making the grant, annexed the implied condition that the track and right of way shall be kept in such a condition as to avoid danger from fire spreading therefrom." It might seem, from a casual examination of the language here quoted, that if a railway company permitted inflammable material to accumulate on its track and right of way, and by any means fire was communicated thereto, which, spreading to, destroyed the property of another, liability would thereby attach; but such, upon principle, cannot be the case, for this implied condition annexed to the grant is to keep the track and right of way in such a condition as to be reasonably free from danger by fire incident to the passage of locomotives and trains. If a railroad company, not using its line of railway, were to permit dry grass or shavings to accumulate on the track and right of way, and such material should be set on fire by any means by another, it would certainly not be contended that the railroad company would be liable for any damages that might result therefrom. So, too, if the railroad track, with inflammable material allowed to accumulate thereon, were in constant use by the company in the operation of its trains, and some evil-disposed person were to apply a lighted match to such material, or if the same were struck by lightning, whereby it became ignited, and injury resulted, the railroad company would not be liable therefor. The use of steam as a motive power renders a fire in the locomotive a necessity, and it is against this agent, when so confined and used, that the company operating the engine must carefully guard; and to render it liable for negligence in this respect it must appear, either directly or by necessary inference, that the fire doing the injury complained of emanated from the receptacle in which the legislative grant permits it to be transported. "A railway company," says STAPLES, J., in *Railroad Co. v. Medley*, 75 Va. 499, "may be supplied with the

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best engines and the most approved apparatus for preventing the emission of sparks, operated by the most skillful engineers; it may do all that skill and science can suggest in the management of its locomotives; and still it may be guilty of gross negligence in allowing the accumulation of dangerous combustible matter along its track, easily to be ignited by its furnaces, and thence communicated to the property of adjacent proprietors. Conceding that a railroad company is relieved of all responsibility for fires unavoidably caused by its locomotives, it does not follow that it is exempt from liability for such as are the result of its negligence or mismanagement. The removal of inflammable matter from the line of the railroad track is quite as much a means of preventing fires to adjoining lands as the employment of the most approved and best-constructed machinery." When it appears in evidence that damages have resulted from a fire caused by sparks or cinders emitted from a locomotive, a presumption of negligence in the construction and management of such engine is thereby created which it is incumbent upon the railroad company to overcome, and it may ordinarily escape responsibility by showing that the engine, which was the primary cause of the injury, was properly constructed, had the most approved appliances for arresting sparks and cinders, and was carefully operated by skillful and competent employees. *Koontz v. Navigation Co.*, 20 Or. 3, 23 Pac. 820. The rule to be extracted from the Virginia case, however, would seem to be that, if the evidence conclusively shows that sparks or cinders were emitted from a locomotive, thereby igniting inflammable material negligently permitted by the railroad company to accumulate on its track and right of way, and, spreading therefrom, destroyed the property of another, the railroad company would be liable for the damage resulting, which it could not evade by showing that the engine distributing the fire was faultless in construction, perfect in appliances for arresting sparks, and skillfully and carefully operated. *Railway Co. v. Overman*, 110 Ind. 539, 10 N. E. 575; *Gibbons v. Railroad Co.*, 66

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Wis. 161, 28 N. W. 170. Such a rule would seem just in its application, for it might reasonably be expected that sparks or cinders would be emitted from a locomotive, notwithstanding every precaution against their escape has seemingly been taken, and, when falling upon inflammable material negligently permitted by a railroad company to accumulate on its track or right of way, which is thereby ignited, and the fire spreading to, destroyed the property of another, the secondary, perhaps, but the real, cause of the injury is the negligence of the company in permitting the accumulation of such material, in view of which the character of the engine, its appliances, or operation must necessarily become immaterial factors in avoiding liability resulting from the destruction of property which might have been prevented by the exercise of greater care in the removal of such dangerous material.

In the case at bar the evidence tends to show that the fire started on the right of way, or at least the witness Gates so thought from his point of observation, about three-quarters of a mile distant; but that it was caused by a spark or cinder emitted from the engine is inferable only from the mere fact that a train passed the point where the fire originated a few minutes before it was discovered. The evidence also tends to show that soil of the character destroyed had been known to retain fire for months after being ignited; but it also appears that there had been no fire, prior to the one in question, in this immediate vicinity that fall, so that the inference that the fire might have originated from smoldering embers is rebutted. It is generally known that sparks and cinders escape from engines and cause fires which destroy property, and, this being so, the probability of danger from this cause must necessarily be in inverse ratio to the remoteness from the railway track, in view of which we think an inference is reasonably deducible that a fire occurring immediately after the passage of a train, and discovered in combustible material negligently permitted to accumulate on the track or right of way, originated from a spark emitted

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from the engine, and particularly so when other evidence has been introduced tending to rebut any inferences that it might have arisen from other causes, thereby imposing upon the railroad company negligently permitting the accumulation of such material which has given rise to the fire the burden of dispelling such inference by raising a counter inference that the fire could not reasonably have been started in this manner by showing that the track at that point was level, that the engine was properly constructed, possessed suitable appliances for arresting sparks and cinders, was operated by skillful, careful, and competent employees, and that it was not laboring to start the train to which it was attached or to stop it after being set in motion; thus leaving the question to the jury to ascertain the fact from an examination and consideration of all the evidence whether or not the fire causing the injury originated from a spark or cinder emitted from the locomotive. Such a rule, it would seem upon principle, ought to be enforced, for, having been negligent in permitting the accumulation of dry grass and other inflammable material at exposed places, it is reasonable to infer from the fact that the fire was started therein that it was caused by a spark given off by the engine; and as the means of dispelling the inference is entirely in the power of the railway company, the person sustaining the injury cannot be expected to know, much less to prove, that the engine was defective in its appliances or construction, or that it was negligently operated on the occasion of the fire, in view of which, to compel him to establish these facts would, in many instances, be equivalent to a denial of justice. 1 Thomp. Neg. 153, subd. 3. In case, however, a fire starts beyond, or even on, the right of way, if no inflammable material is permitted to accumulate thereon, and loss of property result to another therefrom, the person sustaining the damages ought to be obliged to give evidence of such facts, in addition to the discovery of the fire soon after the passage of a train, as would tend to raise an inference that the fire was caused by carelessness, either in the construction

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or operation of the engine, before the railroad company should be required to rebut such inference, because it might reasonably have been expected that fires will occur as an incident to the operation of trains by steam as a motive power; but where the inflammable material negligently permitted to accumulate on the track or right of way is ignited, and the fire is discovered soon after the passage of a train, the duty should be imposed on a railroad company, after the proof of this fact, and the introduction, if possible, of evidence tending to show that the fire could not reasonably have occurred from other causes, to rebut the inference of carelessness arising from proof of the fire, because it could not have been reasonably supposed that such material would have been allowed to accumulate. The plaintiffs in this case gave evidence tending to show that the fire did not arise from smoldering embers in the soil, and having also shown that it probably started on the right of way, in combustible material, they made such a case as to raise an inference that it was caused by a spark emitted from the engine, to dispel which the duty was imposed upon the defendant to show that the engine was properly constructed, and carefully operated; and, this being so, the judgment of nonsuit cannot be predicated on that ground, and hence it follows that the judgment is reversed, and the cause remanded for retrial.

NOTES.

Allowing Accumulations of Combustibles on Right of Way, Generally.—Negligence of railroad company in leaving combustible material on right of way, see notes 32 Am. & Eng. R. Cas. 372; *id.* 475.

Negligence may be imputed to a railroad company if it allows combustible material to accumulate on its right of way in such quantity, at such places, and at such seasons as render it liable to become ignited and cause damage to adjacent property. *Eddy v. Lafayette*, 49 Fed. Rep. 807, 4 U. S. App. 247, 1 C. C. A. 441; *Indiana, B. & W. R. Co. v. Overman*, 29 Am. & Eng. R. Cas. 161, 110 Ind. 538, 10 N. E. Rep. 575; *Jones v. Michigan C. R. Co.*, 25 Am. & Eng. R. Cas. 482, 59 Mich. 437, 26 N. W. Rep. 662; *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 299, 14 Am. Ry. Rep. 226; *Aycock v. Raleigh & A. A. L. R. Co.*, 89 N. Car. 321; *Ft. Worth & D. C. R.*

Notes

Co. v. Hogsett, 67 Tex. 685, 4 S. W. Rep. 365; Gulf, C. & S. F. R. Co. v. Kluge, 4 Tex. App. (Civ. Cas.) 577, 17 S. W. Rep. 944; Jaffrey v. Toronto, G. & B. R. Co., 23 U. C. C. P. 553.

A railroad company may be supplied with the best engines and the most approved apparatus for preventing the emission of sparks, and be operated by the most skilful engineers; it may do all that skill and science can suggest in the management of its locomotives; and still it may be guilty of gross negligence in allowing the accumulation of dangerously combustible matter along its track, easily to be ignited by its furnaces, and thence communicated to the property of adjacent proprietors. Richmond & D. R. Co. v. Medley, 7 Am. & Eng. R. Cas. 493, 75 Va. 499; Gram v. Northern Pac. R. Co., 45 Am. & Eng. R. Cas. 544, 1 N. Dak. 252, 46 N. W. Rep. 972; Toledo, W. & W. R. Co. v. Wand, 48 Ind. 476.

A railroad company, having only acquired a new track a few days, is liable for fire started by sparks from its locomotives in inflammable matter on the right of way, to the same extent as if it had operated the road any length of time. Lake Erie & W. R. Co. v. Cruzen, 29 Ill. App. 212.

It is negligence in a company to place near its track rubbish, such as old, dry ties, which, being fired by sparks from a locomotive, communicate the fire to plaintiff's property. Troxler v. Richmond & D. R. Co., 74 N. Car. 377, 13 Am. Ry. Rep. 389; Aycock v. Raleigh & A. A. L. R. Co., 89 N. Car. 321.

An instruction to the jury that they must consider whether there was any negligence on the part of the defendant in leaving bark and grass and other combustible material, if there was any such, within its right of way is not open to the objection that the jury must infer that by so leaving bark and grass within the right of way the defendant was guilty of negligence *per se*. Abbot v. Gore, 40 Am. & Eng. R. Cas. 244, 74 Wis. 509, 43 N. W. Rep. 365.

Where a company leaves dry hedge trimmings along its right of way, which either originate or increase a fire caused by sparks from its locomotive, and cause such fire to spread to a stubble field, the company is guilty of negligence. Smith v. London & S. W. R. Co., L. R. 6 C. P. 14, 40 L. J. C. P. 21, 23 L. T. 678, 19 W. R. 230.

Dry Grass.—It is not negligence *per se* for a railroad to suffer dry grass and weeds to accumulate on its right of way; the fact, however, is proper evidence for the jury, who may find negligence from it. Ohio & M. R. Co. v. Shanefelt, 47 Ill. 497; Perry v. Southern Pac. R. Co., 50 Cal. 578, 12 Am. Ry. Rep. 187; Kesee v. Chicago & N. W. R. Co., 30 Iowa 78; Kansas Pac. R. Co. v. Butts, 7 Kan. 308, 2 Am. Ry. Rep. 477; White v. Missouri Pac. R. Co., 13 Am. & Eng. R. Cas. 473, 31 Kan. 280, 1 Pac. Rep. 611; Burlington & M. R. Co. v. Westover, 4 Neb. 268; Gram v. Northern Pac. R. Co., 45 Am. & Eng. R. Cas. 544, 1 N. Dak. 252, 46 N. W. Rep. 972; Kelsey v. Chicago & N. W. R. Co., 43 Am. & Eng. R. Cas. 43, 1 S. Dak. 80, 45 N. W. Rep. 204; Texas & P. R. Co. v. Medaris, 29 Am. & Eng. R. Cas. 159, 64 Tex. 92.

Philips *v.* Philadelphia & R. T. R. Co

PHILIPS

v.

PHILADELPHIA & R. T. R. Co.

(Supreme Court of Pennsylvania, Feb. 7, 1898.)

Elevated Railroads—Abutting Owners—Elements of Damage—Smoke, etc.—In an action to recover damages sustained by an abutting owner through the construction and operation of defendant's elevated railroad on a narrow street, smoke, noise, ashes, and vibration are not elements for which damages can be recovered.

APPEAL from Philadelphia county court of common pleas. *Affirmed.*

Plaintiff appeals from a judgment in his favor for \$700.

W. Horace Hepburn, for appellant.

John G. Lamb and *Thomas Hart, Jr.*, for appellee.

PER CURIAM. Under the charge of the learned court below, the plaintiff was allowed to recover the full amount of the difference in value of his property before and after the taking of his alley way leading to Division street. This easement is what was taken, and the extent to which his property was injured in consequence of the taking he was permitted to recover. The other elements for which an attempt was made to recover damages, such as smoke, noise, ashes, and vibration, we have frequently ruled, are not elements for which damages can be recovered in such cases as these. The case was fairly and correctly tried, without error in any of the rulings, and the jury has found the actual amount of damages sustained. The assignments of error are all dismissed. Judgment affirmed.

NOTE.

Elevated Railroads—Abutting Owners—Elements of Damage—Smoke etc.—Injuries suffered by an abutting owner from the operation of an elevated railway caused by smoke, noise, vibration, ashes,

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dust, or cinders cannot be compensated in damages. *In re* New York El. R. Co., 36 Hun (N. Y.) 427; Albany Northern R. Co. *v.* Lansing, 16 Barb. (N. Y.), 69; Henderson *v.* New York Central R. Co., 78 N. Y. 423.

The rule above stated is the reverse of that sanctioned in *Re* Utica, C. & S. V. R. Co., 56 Barb. (N. Y.) 456, and followed in *In re* N. Y. C. & H. R. R. Co. 15 Hun (N. Y.) 63, and in *Re* N. Y., L. & W. R. Co., 29 Hun (N. Y.) 1. But the Utica case proceeded upon a departure from what had previously been and has since also been followed as the correct legal principle to be applied and observed, and was deliberately overruled in *In re* New York El. R. case, 36 Hun 427. Upon this subject it has been very generally held that the extent of an owner's right is to be compensated for the property actually taken, and the reduction in value of the residue of his property by the fact of the taking of a part of it. This satisfies and includes all that is contained in the constitutional requirement. It is to compensate him for what may be taken from him under the authority of the constitution and the law, and not to remunerate him for incidental damages or annoyance afterwards arising from the use of the property which is occasioned by the want of care or skill on the part of the party taking and using the property, or by the direction or force of the wind or the state of the atmosphere. See also, in addition to cases first above cited, Troy & Boston R. Co. *v.* Lee, 13 Barb. (N. Y.) 169; Albany & S. R. Co. *v.* Dayton, 10 Abb. N. S. (N. Y.) 183; Black River, etc., R. Co. *v.* Barnard, 9 Hun (N. Y.) 104.

But in *Sloan v. New York El. R. Co. et al.*, 63 Hun (N. Y.) 300, decided in 1892, the supreme court of New York held that it was not error to take into consideration the incidental annoyances from the running of trains in the future; such as "the effect upon the light, air, and access to plaintiff's premises, smoke, dust, cinders, and the like."

In this case the court found that there was no depreciation in the rental value of plaintiff's premises, but that the easements had a certain value which was allowed as damages, and that, among other incidents of injury proper to be taken into consideration, were those named in the above quotation.

Where the construction of a public improvement fills the atmosphere with smoke, gases, ashes, cinders, or other foreign substances, thereby affecting and impairing the property of the air, this constitutes an injury affecting the property, for which the owner may recover compensation in damages. See *Jeffersonville, M. & I. R. Co. v. Esterle*, 13 Bush. (Ky.) 667; *Bangor & P. R. Co. v. McComb*, 60 Me. 290; *Walker v. Old Colony*, 103 Mass. 10; s. c., 4 Am. Rep. 509; *Drucker v. Manhattan R. Co.*, 106 N. Y. 157; s. c., 60 Am. Rep. 437; *Lahr v. Metropolitan E. R. Co.*, 104 N. Y. 268, 295; *Caro v. Metropolitan E. R. Co.*, 46 N. Y. Super. Ct. (14 J. & S.) 438; *Cleveland & P. R. Co. v. Speer*, 56 Pa. St. 325; *Brand v. Hammersmith & C. R. Co.*, L. R. 2 Q. B. 223; *East & West India Docks, etc., v. Gattke*, 3 Mac. & G. 155.

There is a lack of uniformity in the decisions on this point, quite a number of them holding a contrary doctrine, among which are the following: *Mix v. Lafayette, B. & M. R. Co.*, 76 Ill. 319; *Dimmick v. Council Bluffs & St. L. R. Co.*, 62 Iowa, 409; s. c., 10 Am. & Eng. R. R. Cas. 105; *Atchison & M. R. Co. v. Garside*, 10 Kan. 552;

Olin *v.* Denver & R. G. R. Co

Cogswell *v.* New York, N. H. & H. R. Co., 48 N. Y. Super. Ct. (16 Jones & S.) 31; Halsten & T. C. R. Co. *v.* Odum, 53 Tex. 343; City of Glasgow U. R. Co. *v.* Hunter, L. R. 2 H. L. Sc. App. 78.

The inconvenience and annoyance occasioned by noise and the confusion of passing trains is an injury which will be compensated in damages. Little Rock, M. R. & T. R. Co. *v.* Allen, 41 Ark. 431; Mix *v.* Lafayette, 67 Ill. 319; Wilson *v.* Des Moines, O. & S. R. Co., 67 Iowa, 509; Bangor & P. R. Co. *v.* McComb, 60 Me. 290; County of Blue Earth *v.* St. Paul & S. C. R. Co., 28 Minn. 503; First Baptist Church of Schenectady *v.* Schenectady, T. & D. R. Co., 5 Barb. (N. Y.) 79; White *v.* Charlotte & S. C. R. Co., 6 Rich. (S. C.) L. 47; Gulf C. & S. F. R. Co. *v.* Eddin, 60 Tex. 656. However, a contrary opinion is maintained in several well-considered cases. See Republican Valley R. Co. *v.* Lynn, 15 Neb. 234; s. c., 14 Am. & Eng. R. R. Cas. 198; Hammersmith & C. R. Co. *v.* Brand, L. R. 4 H. L. Cas. 176; City of Glasgow U. R. Co. *v.* Hunter, L. R. 2 H. L. Cas. Sc. App. 78.

The vibration and jarring of property resulting from the construction of a railroad and the running of trains thereon, is a proper subject of damages. See Henderson *v.* New York C. & H. R. R. Co., 17 Hun (N. Y.), 344; *In re*, N. Y. C. & H. R. R. Co., 15 Hun (N. Y.), 63; Cohen *v.* City of Cleveland, 43 Ohio St. 190; s. c., 9 Am. & Eng. Corp. Cas. 405; Croft *v.* London & N. W. R. Co., 3 Best & S. 436; s. c., 113 Eng. C. L. 435. Compare Penny *v.* Sou. E. R. Co., 7 El. & Bl. 660; s. c., 90 Eng. C. L. 658.

See, generally, Cogswell *v.* New York, N. H. & H. R. Co., 27 Am. & Eng. R. R. Cas. 376; note to Chicago & E. R. Co. *v.* Blake, 24 Ib. 293; Republican V. R. Co. *v.* Linn, 14 Ib. 198; Rowan *v.* Atlantic, etc., Co., 14 Ib. 332.

See also 4 Rap. & Mack's Dig. 335 *et seq.*; *id.* 76 *et seq.*; & *id.* 919; & 7 *id.* 664 *et seq.*

OLIN

v.

DENVER & R. G. R. Co.

(*Supreme Court of Colorado, June 6, 1898.*)

Abutters—Title to Vacated Street.*—Where the owner of a lot grants all his interest therein to another, without reservation, all the grantor's title to the real estate upon which such lot abuts, and previously dedicated by such grantor for street purposes over lands platted as a town site in accordance with the statutes of Colorado, reverts, upon the vacation of the street, not to the dedicator, but to the grantee of the abutting lot.

*See notes at end of case.

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APPEAL by plaintiff from Pueblo county district court. *Affirmed.*

M. J. Galligan and James Owen, for appellant.

Wolcott & Vaile and Pattison, Waldron & Devine, for appellee.

GABBERT, J. The vital question presented for determination in this case is, to whom does the title to real estate, dedicated for street purposes over lands platted as a town site, in accordance with the statutes of the state, revert, upon the vacation of the street?

This question arises upon the following facts: In 1872, E. W. Olin, as the owner of a tract of land, platted and surveyed it as a town site, under the name of "South Pueblo," which tract included within its limits a portion of a street designated on the plat thereof as "B Street." Shortly after the platting of this town site, the fee-simple title to the lots so platted, abutting each side of a portion of B street, became vested in appellee, which was the status of the title to such lots at the time of the commencement of this action. The conveyances through which appellee derails title to these lots described them according to the plat thereof and by reference thereto. Subsequent to the date when appellee acquired title to these lots, and while it owned them, the city council of South Pueblo vacated that portion of B street upon which they abut, and it is this part of that street which is the subject of controversy between the parties to this action. After the vacation of this portion of B street, Olin conveyed whatever interest he had in these premises to appellant, who commenced an action to recover them from the appellee. It is conceded that whatever title to these premises inured to her grantor, by virtue of the vacation of that portion of B street in controversy, she has acquired; he never having made any conveyance thereof other than to her, except such title as may have passed by conveyance of the abutting lots. The judgment of the trial court was in favor of appellee, from which appellant prosecutes this appeal.

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Appellant bases her claim of title to the premises in dispute on the proposition that, upon the vacation of that portion of B street which includes them, the title thereto reverted to the original dedicator, E. W. Olin, and she, having succeeded to his interest, is now the owner; while, on behalf of appellee, it is contended that upon the vacation of this portion of B street the title thereto vested in the then owner of the lots abutting thereon. The law in force at the time these premises were platted will be found in article 11, c. 84 p. 618 *et seq.*, Rev. St. 1868. Section 5 of this article provides, in effect, that the title to the premises designated as streets, on a tract platted as a town site, shall vest in the city, in trust for the uses expressed in the plat; and, the statute thus specifically directing where the title to the streets shall vest, it is argued by counsel for appellant that the grantee of lots in such plat only takes title to the ground actually included within the boundaries thereof, and no interest in the street abutting; and, the title of the latter being held in trust by the city, that upon vacation it reverts to the original proprietor of the town site.

When a vendee purchases a lot marked upon a plat, reference being made to such plat for a description of the premises conveyed, the construction of the intention of the grantor making such conveyance is that his vendee is entitled to all the appurtenant advantages and rights which the plat proclaims to exist, so far as the land included in it is owned by the grantor. *City of Denver v. Clements*, 3 Colo. 472. By such plat, the right which each lot holder in the premises therein described has in common with other lot owners and the public, in the streets thereon designated, is exhibited, and a reference to such plat makes it a material part of the deed, and has the same effect as if it had been incorporated in such conveyance. *Id.* When there is no reservation in an absolute deed, the most valuable estate passes of which the grantor is seised. *Id.* The conveyance under which appellee acquired title to the lots abutting upon the premises in dispute

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refers to the plat, so that, under the authorities cited, such plat became a part of these deeds. By this plat, it was apparent that the land so platted as streets was for the benefit of the owners of the lots embraced in such plat as well as for the use of the public; and, there being no reservation in any deed through which title was acquired to the lots abutting upon that part of B street subsequently vacated, whatever title the original dedicator of this street had therein passed to those who acquired title to such lots,—the general rule being that, where a grantor conveys a parcel of ground bounded by a street, his grantee takes title to the center of such street, to the extent that the grantor has any interest therein, unless, by the terms of the grant, the boundary of the granted premises is restricted to the line of such street. 1 Warv. Vend. 382; *In re Robbins*, 34 Minn. 99, 24 N. W. 356; Martind. Conv. § 104; *Kneeland v. Van Valkenburgh*, 46 Wis. 434, 1 N. W. 63.

It is contended, however, by appellant, that this rule is not applicable in this case for the reason that the fee to the disputed premises was vested in the city, in trust, subject to a reversion to her grantor, if vacated as a street, at the time he parted with his title to the lots abutting thereon. This proposition is based upon the assumption that, the fee of the street being in the city, the proprietor of the town site had no interest in the street to convey, when he granted title to the abutting lots, and therefore granted none in such street. This proposition is defeated by the express words of the statute above cited. The platting of these premises as a town site, in accordance with the provisions of this statute, merely vested in the city the title to the ground therein reserved as streets, in trust for the purposes expressed in the plat thereof, namely, for the benefit and use of the abutting lot owners and the public for street purposes, whereby the city only acquired a qualified fee in such streets for these purposes; so that there still remained in the proprietor a reserved right in such streets, which was capable of being transferred

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by deed to the purchaser of abutting lots as rights appurtenant thereto (Railroad Co. *v.* Nestor, 10 Colo. 403, 15 Pac. 714; Kimball *v.* City of Kenosha, 4 Wis. 321); and under the rule above announced, governing the rights which the vendee of a lot acquires in the street upon which such lot abuts, E. W. Olin, when he conveyed title to the lots abutting the premises in controversy, without any reservation, granted all his interest in the street which now includes such premises, subject to the easements created by the statute (Kimball *v.* City of Kenosha, *supra*); and, when such street was vacated, the trust of the corporate authorities ceased to exist, and the land embraced therein reverted to the adjoining owner, the one for whose benefit such trust was created. Whatever may be the interest of the proprietor of a town site in the lots designated as streets, whether in *esse* or in *futuro*, they having been specially set apart for the benefit of lot owners, it is necessary for their protection that whatever rights such proprietor may have in such streets, in the absence of a reservation to the contrary, must be held to pass to the owners of such lots; and our conclusion is that, when the streets designated on a plat of premises platted under the statute of 1868 are vacated, the title to the center of such streets vests in the owners of the lots abutting that portion of the streets so vacated.

We are aware that the supreme court of Illinois holds that, on the vacation of a street, the title thereto reverts to the original dedicator,—St. John *v.* Quitzow, 72 Ill. 334, and Gebhardt *v.* Reeves, 75 Ill. 301, which are the leading cases in that state on this subject, and the first to announce that doctrine unqualifiedly, which was in 1874. It is claimed that our statute on this subject is borrowed from Illinois, and that according to the rule that a legislature, in adopting the statute of another state, is presumed to have in mind the construction theretofore given such statute by the courts of that state, this court should follow the Illinois courts in deciding the question under consideration. It is not necessary to consider this proposition, for the reason

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that, at the time the act of 1868 was passed, the decisions in the above cases had not been announced. A comparison of the Illinois statute, quoted in the case of Trustees v. Haven, 11 Ill. 554, with our own, under consideration in this case, discloses the fact that the two are very differently worded, though on the one question, that the title of land intended to be used for streets, as exhibited on any plat thereof, shall be held by the corporate authorities in trust, they are alike, though the phraseology employed is different. From a comparison of the Illinois statute with that of Wisconsin on the same subject, which may be found in Kimball v. City of Kenosha, *supra*, it appears they are quite similar, that portion of the statute with reference to where the title to the streets of platted premises shall vest being exactly alike in both instances. In Wisconsin [Kimball Case, *supra*] the holding of the supreme court of that state has been directly opposite to that of Illinois,—a construction which we think is more just and equitable than the one subsequently adopted by the supreme court of the latter state. In this connection it is worthy of notice that the legislature of our state, in 1889, passed an act by which it was provided that, when the streets designated on the plat of a city or on lands laid out as a town site are vacated, the fee of the land included within so much of such streets as may be vacated shall vest in the proprietors of the abutting lots, each abutting owner taking to the center of the street vacated. Mills' Ann. St. § 4370. While this act is not in any manner considered in reaching a decision in this case, it is fair to presume that it was, doubtless, prompted by the intimation of the supreme court in the case of Railroad Co. v. Domke, 11 Colo. 247, 17 Pac. 777, which will be noticed later, and is instructive as expressive of the sense of the lawmaking power of this commonwealth as to what would be just and equitable relative to where the title to land embraced in streets and alleys should vest in the event they were vacated.

It is urged upon our attention that to permit appellee to hold the ground in question results in allowing it to

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acquire these premises without consideration. This proposition is not tenable. The proprietor of premises platted as a town site, by reason of dedicating a part for use as streets, enhances the value of the lots to which access may be had by means of such streets. His grantees pay this enhanced value, and the proprietor thus receives a consideration, not only for the precise amount of land described in each lot, but also that embraced in the streets upon which the lots abut; and he who has already been once paid for his land cannot, in equity, be heard to assert title thereto as against one who has paid him the consideration therefor.

It is contended by appellant that the Domke Case, *supra*, is authority in support of the proposition contended for by her in this case. In that case the opinion rendered in the Gebhardt Case, *supra*, is mentioned, and an intimation given that, on the vacation of a street, the title thereto would not pass to the abutting lot owners. That question, however, was not involved in the Domke Case. The court was then considering the right of Domke to recover damages resulting to his property from the use of the street in front of his premises for railroad purposes. The title to the street itself was not involved, nor was Domke making any claim for damages by reason of any ownership in such street, and what was there said by the supreme court on the subject now under consideration, or in any other case where it might be said an intimation was given that the abutting lot owner had no interest in the street,—in which, however, the question now presented was not involved,—must be treated as mere *dicta*, which, though entitled to respect, inasmuch as they go beyond the real questions considered in the cases in which they occur, are not controlling in a subsequent suit, when the very point to which they apply is presented for decision. Wadsworth v. Railway Co., 18 Colo. 600, 33 Pac. 515; Cohens v. Virginia, 6 Wheat. 264.

The question as to what rights other lot owners or the public might have in the disputed premises for street purposes is not presented in this case. The only question

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involved under the character of action brought by appellant is, which of the parties to this action is the owner of such premises and entitled to the possession thereof? The judgment of the district court is affirmed. Affirmed.

NOTES.

Title of Abutters to Vacated Street.—Unless there is something to take the case out of the general rule, the effect of the lawful vacation of a street is to discharge the public easement and leave the fee in the abutter upon each side, presumably to the center of the land which formed the street, free from the burden thereof. *Lamm v. Chicago, etc., R. Co.*, 45 Minn. 71; *Challis v. Atchison, etc., R. Co.* (Kan. 1891), 25 Pac. Rep. 894; *Thomsen v. McCormick* (Ill. 1891), 26 N. E. Rep. 373; *Hamilton v. Chicago, etc., R. Co.*, 124 Ill. 235; 19 Am. & Eng. Corp. Cas. 610; *Day v. Schroeder*, 46 Iowa 546; *Weisbrod v. Chicago, etc., R. Co.*, 18 Wis. 43; 86 Am. Dec. 743; *Burbach v. Schweinler*, 56 Wis. 391; *Wallace v. Fee*, 50 N. Y. 694; *West Covington v. Freking*, 8 Bush. (Ky.) 121; *Atchison, etc., R. Co. v. Patch*, 28 Kan. 470; *Ott v. Creiter*, 110 Pa. St. 370; *Banks v. Ogden*, 2 Wall. (U. S.) 69.

Same—Illinois Doctrine.—By the vacating by the city of Chicago of a street previously dedicated to it, the title to the ground does not pass to the abutting lot-owner, but to the original owner of the land. *Wirt v. McEnery* (U. S. C. C.) 6 Am. & Eng. Corp. Cas., O. S., 105.

PLETCHER

v.

SCRANTON TRACTION CO.

(*Supreme Court of Pennsylvania, March 21, 1898.*)

Killing Boy on Track—Contributory Negligence--Excessive Speed--Proximate Cause.*—It appeared from the evidence that plaintiff's son ran upon defendant's track immediately in front of an approaching car, and was killed. *Held*, that it was not error to refuse to take off the judgment of nonsuit, even if the evidence showed that the car, at the time, was running at an excessive rate of speed, it having been incumbent on plaintiff to show that defendant's negligence was the proximate cause of the accident.

APPEAL by plaintiff from Lackawanna county court of common pleas. *Affirmed.*

*See note at end of case.

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The following is the opinion of the court below:

“That the car by which the plaintiff’s son was killed was running at a high and possibly negligent rate of speed may for the present be conceded. The distance which it ran before it could be stopped would go to prove this, if there were nothing else. *Dunseath v. Traction Co.*, 161 Pa. St. 124, 28 Atl. 1021. But, unless this was the proximate cause of the accident, or was a material factor in it, the defendant, notwithstanding it, is not liable. *Goshorn v. Smith*, 92 Pa. St. 435. The testimony of Frank Jackson establishes clearly how the accident occurred. Four or five boys, of whom the deceased was one, were chasing each other along the street on the way home from school. About at the point where the accident occurred, they turned off from the sidewalk, across the street and car track, at an angle. Two of the boys, who were considerably in advance of the others, had reached the opposite side, when the Pletcher boy, closely followed by young Jackson, started across also. They apparently took no account of the coming car, and did not, in fact, observe it. It was so close upon them, however, that, when young Pletcher ran onto the track, it must have been but a few feet away. Young Jackson says he just saw it himself in time to turn aside as it shot by, and that Pletcher was but five or six feet ahead of him. He called to him to look out for the car, and, as he did so, Pletcher stopped, but looked in the opposite direction from that in which the car was coming. Another instant, and in all probability he would have been across, and out of danger; but stopping as he did, the car struck him, and he was killed. There is no dispute over these facts, and it is evident from them that the boy darted in front of the car when it was so close upon him that, stopping as he did, it was inevitable that he should be struck. The excessive speed of the car had nothing to do with the matter. For all that we can see, it would have occurred had the car been running at an entirely safe and proper rate. The case is not to be distinguished from *Funk v. Traction Co.*, 175 Pa. St. 559, 34 Atl.

Note

861. There is no difference, in principle, between running into a moving street car and running directly in front of it. The case is not like that of *Woekner v. Motor Co.*, 176 Pa. St. 451, 35 Atl. 182. The child there was of tender years, playing between the side of the street and the car track; but the boys here were of such size and age as to warrant the belief that they would not heedlessly run into danger. The suggestion that they formed a procession across the street, of which the motorman was bound to take notice, is highly imaginative. The rule to take off the nonsuit is discharged."

I. H. Burnes and Frank T. Okell, for appellant.

W. H. Jessup and W. H. Jessup, Jr., for appellee.

PER CURIAM. Without assenting to all that was said by the learned president of the court below in his opinion refusing to take off the judgment of nonsuit, we are satisfied as to the substantial correctness of his conclusion. It was, of course, incumbent on the plaintiff to prove that the proximate cause of the sad accident in which his son lost his life was negligence of the defendant company's motorman. We are not satisfied that the testimony on which he relied for that purpose was sufficient to have justified the learned trial judge in submitting the question of the motorman's negligence to the jury. Failing to find any error in the record, the judgment is affirmed.

NOTE.

Personal Injuries—Excessive Speed Does not Excuse Contributory Negligence.—It is not sufficient to exonerate a party from a charge of contributory negligence in attempting to cross a track in the face of an approaching locomotive, to show that he might reasonably have supposed that if the locomotive ran at its usual and lawful rate of speed for that place he could cross without harm. He has no more right to presume that the men in charge of the locomotive will obey the requirements of the law, than they have that he will obey the instinct of self-preservation and not unnecessarily thrust himself into danger. *Kelley v. Hannibal & St. J. R. Co.*, 13 Am. & Eng. R. Cas. 638, 75 Mo. 138.

Note

One who is injured in attempting to cross a track at a public crossing ahead of an approaching train cannot recover, though the train approached at unusual speed without signals, if he either knew of the proximity of the train and took the hazard of a leap across the track in front of the engine, or else failed to look and listen for the train when he knew it was approaching, and when, if he had used his senses, he could not have failed both to hear and see it. *Little Rock & Ft. S. R. Co. v. Cullen*, 54 Ark. 431, 16 S. W. Rep. 169.

It does not excuse one who attempts to cross in front of a locomotive which he sees approaching at no great distance, that the speed was eighteen miles an hour where a municipal ordinance limited the speed at that point to ten miles an hour. *Korrady v. Lake Shore & M. S. R. Co.*, 131 Ind. 261, 29 N. E. Rep. 1069.

A traveler has no right to attempt to cross a track in front of an approaching train at what is nothing more than a common country crossing, although it is within the limits of a city, or to use a part of the railway within said limits as a footpath, relying solely upon the expectation or belief that the trains will be run not to exceed a certain rate of speed fixed by city ordinance. *Studley v. St. Paul & D. R. Co.*, 48 Minn. 249, 51 N. W. Rep. 115.

Although a railroad company is *per se* guilty of negligence, and also violates the law in running its train within an incorporated town faster than six miles an hour, recovery cannot be had of it for the death of one whose contributory negligence, in recklessly exposing himself before the train while so running, was unmistakably the efficient cause of his being struck by the engine and killed. *Crawley v. Richmond & D. R. Co.*, 70 Miss. 340, 13 So. Rep. 74; *Baltimore & O. R. Co. v. State*, 69 Md. 551, 18 Md. L. J. 824, 16 Atl. Rep. 212.

Just before an accident the engine had passed over a crossing going east, and was returning, going west. Deceased stepped on the track just in front of the engine when there was nothing to obstruct the view. Just after he was struck, he said: "I was on the railway and did not know it was coming back until it struck and killed me." *Held*, contributory negligence, preventing a recovery, although there was evidence tending to show that the engine was running at fifteen miles per hour, when by the city ordinance they were prohibited from running faster than six miles per hour. *Texas & N. O. R. Co. v. Brown*, 2 Tex. Civ. App. 281, 21 S. W. Rep. 424.

See also 8 Am. & Eng. R. Cas. N. S. and *note*, 428 *et seq.*

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GOODRICH

v.

BURLINGTON, C. R. & N. Ry. Co.

(*Supreme Court of Iowa, Oct. 22, 1897.*)

Railroad in Street—Injury to Boy on Track—Defective Construction—Negligence.*—The jury properly found the defendant guilty of negligence, where the evidence was that the space between its guard and mainrails, at a certain point in a public street was wider than was usual or necessary, and that the space below the balls of the rails had not been properly filled, such construction having resulted in the detention of plaintiff's foot until it was crushed by the cars.

Negligence—Question for the Jury.—Where the evidence tended to show that the brakemen in charge of detached cars had received an emergency signal from a fellow employee standing on the ground in time to stop them, and prevent the accident, whether he was negligent in not doing so was a question of fact for the jury.

Contributory Negligence—Evidence.—The plaintiff, a boy of 14 years of age, while attempting to cross a public street, while observing from a safe distance an approaching train, had his foot caught and held between improperly constructed rails until it was crushed by the train. *Held*, that he was not guilty of contributory negligence.

Rights of Defendant as Occupant of Street—Plaintiff's Evidence.—In such action it was error to refuse to permit the introduction in evidence of certain city ordinances to show that the defendant railroad company had no exclusive right to the use of the street where the accident occurred.

Condition of Sidewalk—Evidence.—Where the defendant claimed that the plaintiff should have used a narrow walk instead of the middle of the street, it was error not to allow the plaintiff to show that such walk was rendered dangerous by a guard rail.

APPEAL from Linn county district court. *Reversed.*

Rickel & Crocker, for appellant.

Preston, Wheeler & Moffit and *S. K. Tracy*, for appellee.

ROBINSON, J. The plaintiff is a minor and appears by his next friend. In June 1894, when he was about 14

*See note at end of case.

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years of age while he was walking across fourth street in Cedar Rapids, his left foot was caught between a main rail and a guard rail of one of the defendant's railway tracks, which were laid in the street, and was run over by a car and so injured that the limb was necessarily amputated. The evidence tends to show the following facts: Fourth street extends from north to south, and is crossed at right angles by several streets, among which are C and D avenues, the latter being furthest north. From a point south of C avenue, to a point a considerable distance north of D avenue, several railway tracks, including switches, are laid and maintained in Fourth street. In the morning of the day of the accident, the plaintiff, with a companion named Oudkirk, went north along Fourth street, to bathe in the river north of it. They returned a short time afterwards, and walked for some distance on the platform of a freight house which is on the west side of Fourth street, and north of D avenue, and then started across the street in a southeasterly direction in search of a keg of drinking water, which was usually kept in that locality. They crossed several tracks without finding the water, and then continued southward on the street, between railway tracks crossing D avenue. As they approached C avenue, they saw that it was obstructed by cars which were standing on a track which was west of them; and wishing to reach C avenue at a point west of the standing cars, to avoid them, and when about 100 feet north of C avenue, they turned in a southwesterly direction. They crossed one of the two tracks which were then west of them, and, in attempting to cross the last rail of the west track at a switch, the plaintiff's foot slipped between the rails and below the balls, and was caught and held so firmly that the plaintiff and Oudkirk could not loosen it. An instant before that occurred, the cars which were in charge of a switching crew were started, the two at the north end were cut off, and propelled northward on the track in which the plaintiff was caught, and were not stopped until they had passed over the

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plaintiff's foot. The petition alleges that the accident was due to negligence on the part of the defendant in the following particulars : In maintaining and operating its track at a place where it did not have the right to do so ; in permitting the guard and main rail to be in a worn and dilapidated and unsafe condition, with the opening between them unnecessarily large, without proper safeguards ; and in not using due care in switching the car which caused the injury, including the keeping of a proper lookout for danger to persons in the street ; in not heeding warnings of the plaintiff's danger, and obeying signals to stop in time to avoid the accident.

1. The evidence tended to show that the space between the guard and main rails where the plaintiff's foot was caught was wider than was usual or necessary ; that it had not been properly filled below the balls of the rails ; and that had the space between the rails been of the ordinary width, and filled in part, as it might have been, the plaintiff's foot could not have been caught, and the accident would not have happened. Fourth street, from C avenue northward, is a public thoroughfare, much used by pedestrians. There is a walk on the west side, which was used, however, by but a small part of the people who walked along the street. It was narrow, and so near railway tracks that passing cars would endanger those who used it. The rights of the people were not confined to the sidewalk, but they were entitled to use all parts of the street in a proper manner, and for proper purposes, subject to the rights of the railway companies having tracks in it. That is well settled. Bryson v. Railway Co., 89 Iowa, 677, 57 N. W. 430 ; Railway Co. v. Bennett (Ind. App.) 35 N. E. 1036 ; Railway Co. v. Phillips, 112 Ind. 59, 13 N. E. 132 ; Railroad Co. v. Head, 80 Ind. 117 ; Railroad Co. v. Pointer, 9 Kan. 620 ; Railroad Co. v. Walker, 70 Tex. 126, 7 S. W. 831 ; Elliott, Roads & S. 478 ; Patt. Ry. Acc. Law, § 154 ; 24 Am. & Eng. Enc. Law, 33. It was the duty

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of the defendant to maintain and use its tracks and appurtenances with reference to the rights of the public and the use made of the street. To so construct and maintain its tracks, or to so use them, as to unnecessarily endanger persons who use the street properly, would be negligence; and, in the absence of contributory negligence, the defendant would be liable for resulting damages. *Clampit v. Railway Co.*, 84 Iowa, 72, 50 N. W. 673; *Smedis v. Railroad Co.*, 88 N. Y. 20; *Frick v. Railroad Co.*, 75 Mo. 599. The evidence would have authorized the jury to find that the defendant was negligent in not having the guard rail properly placed with respect to the main rail, and in not having the space between them properly blocked.

2. At the time of the accident, cars were being switched in Fourth street by an engine and crew of the defendant. The engine was at the south end of a train of eight or ten cars, the north end of the train being in C avenue. When the plaintiff stepped between the rails of the track on which he was hurt, the engine was moved so as to start the north two cars which had been cut off from the others northward, towards the plaintiff, on the track he was crossing, at a speed of two or three miles an hour. An instant after the cars were started, the plaintiff's foot was caught. He was then about 90 feet from the cars. One of the switching crew, named Binko, was opposite the middle or south end of the north car, a few feet east of it. Wiley, the foreman of the crew, had cut the cars off, and was standing near the southeast corner of the south car. Zeedick, another member of the crew, was on top of the third car from the north end of the train, or the first one remaining after the cars were cut off. Augustine, another member of the crew, was more than 100 feet north of the plaintiff. As soon as the plaintiff was caught, he made an outcry. Oudkirk turned, and, discovering his condition, joined in the outcry, and tried to free him. Augustine heard the cries, and, seeing the plaintiff's danger, he gave Binko the signal to stop, hallooed, gave a second sig-

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nal to stop, and ran for the approaching cars. He reached them when they were yet several feet south of the plaintiff, but, before he could climb upon and stop them, they had passed over the plaintiff's foot, although they were stopped within two or three feet of him. A boy who heard the outcry, after waiting a few moments to satisfy himself as to the cause, ran a distance of more than 300 feet, and reached the plaintiff before the north car touched him. It is not shown that any of the men with the train saw the plaintiff before the accident, but the evidence tends to show that Binko saw Augustine's signal to stop, and repeated it to the men in charge of the engine, and that the hallooing of the plaintiff, Oudkirk, and Augustine was so loud as to be heard the distance of a block or more south of where Binko and Wiley were. See *Ford v. Railway Co.*, 69 Iowa, 627, 21 N. W. 587, and 29 N. W. 755. The signal given by Augustine was an emergency signal, and was designed as a direction, not only to stop the train, but also the detached cars. Had there been a brakeman on one of the moving cars, on the lookout for danger to persons on the track, it is clear that the cars would have been stopped in time to avert the accident. Some of the evidence tended to show that Binko and perhaps others of the crew could have stopped the car after he received Augustine's signal. We do not say that it was the duty of the defendant to be on the lookout for persons caught in its guard rails, but it was required to use reasonable care and diligence, in view of the condition of its yard and tracks, and the use which pedestrians rightly made of the street, to prevent accidents. Considering the use made of the street, the positions occupied by employees of the defendant, the distance of the moving cars from the plaintiff, the signals given and outcry made, we are of the opinion that whether the defendant was negligent in not sooner stopping the cars was a question of fact for the jury; and this, we think, is true, even though it be found that the plaintiff was negligent in permitting his foot

Negligence—Question for the Jury.

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to be caught by the guard rail. If, after his danger was known to the defendant, it failed to use due diligence to stop the cars and avoid the accident, it would be liable. *Sutzin v. Railway Co.* (Iowa) 63 N. W. 711; *Orr v. Railway Co.* (Iowa) 62 N. W. 852, and cases therein cited.

3. It is said that negligence on the part of the plaintiff contributed to the accident, and for that reason he should not recover. Whether he was negligent depends upon all the circumstances of the case. He was not a trespasser upon the street, but was there by right. Until he discovered that the crossing at C avenue, in the direction in which he wished to go, was blocked by cars, he was in a place of safety. When he found the crossing blocked, he attempted to cross the street at a safe distance from a train which was not in motion.

Contributory Negligence—Evidence.

He did not know anything of the condition of the guard rail which he attempted to cross, nor did he know anything of the danger of being caught by it. His attention appears to have been drawn to the train which was moved while he was in the act of crossing the track. It is evident that, had he observed the opening formed by the guard rail, he could easily have stepped over it; but in view of the facts stated, and his youth and lack of knowledge, it cannot be said, as a matter of law, that in permitting his attention to be diverted from the place where he was walking, to the train, he was negligent. The defendant, in support of the claim that the plaintiff was negligent, relies upon the rule that a person having two ways of travel is negligent if, without good reason, he leaves the safe for the unsafe way, and cites numerous cases as applicable in this case. Among them are *Hansen v. Building Co.* (Iowa) 69 N. W. 1020, *Ferguson v. Railway Co.*, *Id.* 1026, and *Ely. v. Des Moines*, 86 Iowa, 55, 52 N. W. 475, which clearly are not in point. The case of *O'Laughlin v. City of Dubuque*, 42 Iowa, 539, involved the liability of the city for injuries sustained by one who, without reason, left the walks provided for pedestrians, and attempted to cross an icy

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street, the conditions of which he knew ; and is readily distinguishable from this. In *Cosner v. City of Centerville*, 90 Iowa, 33, 57 N. W. 636, it appeared that the plaintiff knowingly and without sufficient reason attempted to pass over a portion of a sidewalk which he claimed was unsafe, but the condition of which he knew. The case of *Thomas v. Railway Co.*, 93 Iowa, 249, 61 N. W. 967, involved an alleged trespass upon the defendant's right of way. The cases of *Merryman v. Railway Co.*, 85 Iowa, 634 52, N. W. 545, and *Masser v. Same*, 68 Iowa, 602, 27 N. W. 776, also involved trespasses. The plaintiff in *Richards v. Railway Co.*, 81 Iowa, 426, 47 N. W. 63, followed, without sufficient reason, a route which he must have known to be dangerous, without making reasonable effort to anticipate and avoid danger. We do not think any of these cases sustain the claim that the acts of the plaintiff constituted negligence in law.

4. The appellant complains of the refusal of the district court to permit the introduction in evidence of certain ordinances of the city. As we understand the claim of the appellant, they were intended to show that the defendant's right to the use of Fourth street was not exclusive. The ordinances did not refer to the defendant, but if it can be shown that it succeeded to the rights granted by the ordinance, and is subject to the restrictions therein contained, the ordinances would be competent for the purpose stated, as tending to show the rights of the defendant. Whether the ordinances were competent for any other purpose we do not determine.

Right of Defendant as Occupant of Street—Plaintiff's Evidence.

5. Complaint is made of the refusal of the court to permit the plaintiff to show that the narrow walk on the west side of Fourth street was made dangerous by a guard rail which was near, if not in, the walk. In view of the conclusion we reach, it is only necessary to say as to this that if the defendant claims that the plaintiff should have used that way, instead of walking in the

Condition of Sidewalk—Evidence.

Notes

middle of the street, he should be permitted to show that it was dangerous. We conclude that the district court erred in taking the case from the jury, and its judgment is reversed.

NOTES.

Railroads in Streets—Defective Construction—Injuries to Pedestrians—Liability of Company.—If a railroad is a public highway, the owners are liable, like towns, for all injuries sustained because of defects in their road by persons traveling, either on foot, or in their own carriages, or in those of other persons. *Murch v. Concord R. Corp.*, 29 N. H. 9, 61 Am. Dec. 631.

Mutual Rights of Company and Citizens.—Railroad companies, in running cars on streets or other thoroughfares, are held to a very high degree of care and diligence. The use of that part of the street where the track is laid is not exclusive. The entire public has a right to use such streets. *Toledo, W. & W. R. Co. v. Harmon*, 47 Ill. 298.

Where a track is laid in a public street, the rights of the public and the company respecting the use thereof are mutual, though those of the latter are paramount. A person is not a trespasser who walks along such track, and if in so doing his foot becomes fastened in an opening which exists by reason of negligent construction of the track, and he is run upon by a train of the company which is negligently managed, he being without fault, the company is liable. *Louisville, N. A. & C. R. Co. v. Phillips*, 31 Am. & Eng. R. Cas. 432, 112 Ind. 59, 13 N. E. Rep. 132.

The right of a company to use that part of a street where its track is laid is not exclusive; all other cars, carriages, and persons who are authorized by law to use the same place have the same rights as the company, but the same degree of care and caution must be exercised by each. *Mooney v. Hudson River R. Co.*, 1 Sweeny (N. Y.) 325.

When a track is laid by authority of law in a public thoroughfare, the right of the company owning the track to operate trains thereon is superior to the right of the general public to walk along said track, but having a superior right thereon does not relieve the company from liability to damage for injury to persons caused solely by its negligence in using said track. *Louisville & N. R. Co. v. Yniestra*, 29 Am. & Eng. R. Cas. 297, 21 Fla. 700.

An individual walking on a track in a city street is not a trespasser, and the company must run its trains with reference to him and to all others who may be rightfully upon the street. *Kansas Pac. R. Co. v. Pointer*, 9 Kan. 620.

Texas & P. Ry. Co. *v.* Roberts

TEXAS & P. RY. CO.

v.

ROBERTS *et al.*

(*Supreme Court of Texas, March 7, 1898.*)

Killing of Person on Track—Duty of Trainmen to Person on Track*
—Where a person on a railroad track is killed by defendant's train, defendant is liable if the injury could have been avoided by the use of all means at command by those in charge of the train after deceased was seen by them to be in danger from the train.

ERROR by defendant to court of civil appeals of Fifth supreme judicial district. *Affirmed.*

W. T. Armistead and *W. H. Prendergast*, for plaintiff in error.

O'Neal & Culberson, *O'Neal & Eberhart*, *E. A. Allday*, and *Hogg & Robertson*, for defendants in error.

DENMAN, J. On the 24th day of November, 1888, N. R. Roberts, riding a mule, left the public road where it crossed defendant's track in Queen City on a level with such track, and rode on the track, which gradually increased in elevation, about 170 yards towards Atlanta, where he reached a bridge, and then turned and rode back a few yards to a path which crossed the track, which was at that point about 12 feet high, and there dismounted and was engaged in the vain endeavor to lead his mule down the embankment when defendant's regular passenger train coming from Atlanta to Queen City passed over the bridge and struck and killed him and his mule. The wife and children sued defendant to recover damages for his death, basing their claim upon the grounds (1) that defendant was guilty of negligence in running its train at a great rate of speed

*See *Pierce et al. v. Walters*, 8 Am. & Eng. R. Cas., N. S., 672, and note 677.

Texas & P. Ry. Co. v. Roberts

over a portion of its track which was much used as a road, and in failing to ring the bell or blow the whistle as required by law in approaching said road crossing, and in failing to discover Roberts in time to avoid injury to him; and (2) that defendant was guilty of negligence in failing to use all reasonable means within its power to stop the train after it discovered Roberts' peril. Defendant pleaded (1) general denial; (2) contributory negligence on part of Roberts; and (3) that defendant, after discovering Roberts' peril, used all means within its power to protect him. Upon the verdict of a jury the trial court rendered judgment for plaintiffs, which was affirmed by the court of civil appeals. The court of civil appeals, in its opinion, treated the question of contributory negligence as being material, and held that the evidence did not establish such negligence as a matter of law. This court was inclined to differ with them upon the latter point, and granted defendant's application for writ of error upon the assignment therein complaining of the refusal of a charge asked by it as follows: "In this case the jury are charged that the evidence shows that Roberts was guilty of negligence in going on the railroad with his mule, and remaining there until the train struck him; and you will therefore find for the defendant unless you find that the engineer saw Roberts, and saw that he was in peril, in time to have stopped the train, and failed to do so." Upon a careful consideration of the record we have reached the conclusion that the question as to whether the evidence showed Roberts guilty of contributory negligence as a matter of law need not be determined in this case for the reason that the trial court, in its charge, did not authorize the jury to find for plaintiffs unless they found that defendant's employees operating the train knew of Roberts' peril, and could have avoided injuring him by the exercise of reasonable care; and also charged them to find for defendant if, from the evidence they believed that such employees, "after they had discovered and knew of his peril and danger, did use that degree of care, prudence, and diligence which a man of ordinary

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prudence would have used under like circumstances in employing all the means and appliances in their control and at their command to stop said train, and could not do so, before it struck and killed said Roberts." These charges were more favorable to defendant than the one refused, and made its liability depend upon the existence of two facts, viz: (1) Its discovery of Roberts' peril, and (2) its subsequent failure to exercise reasonable care to avoid injuring him. Therefore there was no error in refusing the special charge. Finding no errors in the record of which defendant can complain, the judgment will be affirmed.

FULLERTON

v.

FORDYCE *et al.*

(*Supreme Court of Missouri, Nov. 3, 1897.*)

Injury to Passenger—Failure to Repair Depot Platform—Examination of Experts.—In an action for personal injuries caused by defendants (receivers), alleged negligence in suffering the platform at their passenger depot to remain out of repair and in a dangerous condition, plaintiff, after defendants had closed their defense, and over their exception, was allowed to examine physicians who, as a commission, had made a physical examination of plaintiff under an order of court. *Held*, that it was not reversible error to allow such examination of such witnesses.

Same—Remarks by Court.—In granting such permission, the court remarked that "the supreme court has indicated in this case that it would like to have this court appoint a commission. I have done so in response to that, and I will permit the commission to testify." *Held*, that such remark was not prejudicial.

Same—Bias of Witness.—A member of such commission had previously, at the request of plaintiff, made an examination of plaintiff; but such member, before testifying, informed the parties that he had made such examination, and no objection to his qualification was then or afterwards made by defendants. *Held*, that defendants had waived all objections to the qualifications of the witness to make an unbiased examination.

Defective Platform—Negligence as a Matter of Law.*—Defendants were guilty of negligence, as a matter of law, in leaving, for four

*See notes at end of case.

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days, unguarded and unlighted, a hole in such platform six feet long and eight inches wide and four feet above the ground.

Expert Testimony.—The qualifications of certain physicians to testify as experts cannot be raised by an instruction directing the jury as to the weight to be given to expert testimony.

Duty to Instruct.—In civil cases courts are not required to give instructions unless requested.

Instructions—Assumptions.—It was not error to assume that plaintiff suffered physical and mental pain, in an instruction in which the jury were required to find that plaintiff was injured as alleged by his fall.

Permanent Injuries—Subsequent Contributory Negligence.*—It was not error to refuse to instruct, as requested, that plaintiff was required, after his fall, to take immediate and proper steps to prevent future consequences resulting from his injuries, such instruction requiring him to possess an infallible judgment.

Injuries and Verdict.—Where it appears from the evidence that plaintiff, in consequence of such fall, suffers from incontinence of urine, injury of the spine, insomnia, impairment of memory, loss of sexual powers, and hernia, and that the injury of the spine is permanent and progressive, a verdict for \$13,500 does not prove that the jury were influenced by improper motives.

APPEAL by defendant from Scott county circuit court. *Affirmed.*

Sam H. West and W. H. Miller, for appellants.
Wilson Cramer, for respondent.

McFARLANE, J. This is an action to recover damages on account of personal injuries received by plaintiff through falling into a hole in the platform of defendant at its station at New Madrid, Mo.

Case Stated.

The ground of the action is negligence in not maintaining the platform in a reasonably safe condition, by reason of which, on leaving a train at said station upon which he was a passenger, plaintiff fell into a hole, and was injured. The answer was, in substance, a general denial, and a plea of contributory negligence. The evidence tended to prove the negligence charged, and the injuries sustained thereby. The trial resulted in a verdict and judgment for plaintiff for \$13,500, from which defendants appealed.

This is the second appeal. The result of the first will be found reported in 121 Mo. 7, 25 S. W. 587. A number of questions disposed of on the first appeal have been reargued, but on these questions we see no

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reason for changing the views expressed on the former hearing, and will not reconsider them. After the case had been remanded, in pursuance of a suggestion of this court, defendants applied to the circuit court for the appointment of a commission of competent and disinterested physicians to make a physical examination of plaintiff with a view of ascertaining the character and extent of his injuries. In compliance with the application, the court appointed Drs. Harris, Tomlinson, and Fraser to make the examination. Dr. Harris declining to act, an examination was made by the other two. In the trial the parties examined, as expert witnesses, physicians called by themselves, respectively, but neither party called as witnesses those who had made an examination of plaintiff, under the order of the court, until after defendant had closed his defense. At this stage of the proceedings plaintiff was allowed, over defendants' exception, to introduce and examine these witnesses. In granting the leave the court remarked in the presence of the jury: "The supreme court has indicated in this case that it would like to have this court appoint a commission. I have done so in response to that, and I will permit the commission to testify." Defendants now insist that the court committed prejudicial error in permitting plaintiff to examine these witnesses out of their regular order, and that the remarks of the court made in the presence of the jury were improper and prejudicial.

Injury to Passenger—Failure to Repair Depot Platform—Examination of Experts.

There was no reversible error in permitting plaintiff to examine these witnesses out of their regular order. The circuit court have a very broad discretion in regard to the order of admitting testimony, and their discretion will not be interfered with unless it clearly appears to have been abused. There was no abuse of discretion in this instance. These witnesses had made a physical examination of plaintiff, under an order of court, with a view of ascertaining the character and effect of his injuries. They were appointed at the request of the defendants, who neglected to use them as witnesses.

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In the circumstances the court properly allowed plaintiff to introduce them after defendants had declined to do so. By the course adopted defendants secured the advantage of a cross-examination of witnesses who had ascertained facts under an order of court made at their request, and they have no just ground to complain. Neither does it appear that the remarks of the court on admitting the testimony could have been prejudicial. The commission was appointed by an order of court, which was a matter of public record. The appointment was made at the request of defendants for the purpose of eliciting the truth and in furtherance of justice. The information given by the court went no further than to advise the jury that the witnesses had made a physical examination of plaintiff by its direction,—a fact which either party had the right to elicit from the witnesses themselves. Surely, defendants, at whose request the commission was appointed, should not complain of the information the jury incidentally acquired from the remarks of the court. Parties calling for such an examination must take the chances of the results. The experts who made the examination became the witnesses of the court rather than of the parties to the action; and, if the parties refused to call them, the court had the right to do so, in which case greater credit would have been given them than was given by the remarks complained of.

2. It appears that Dr. Fraser, a member of the commission, had, at the request of plaintiff, previously made an examination of his injuries. It is insisted that

the doctor could not, in the circumstances, have been wholly unbiased and disinterested. We do not think the conclusion necessarily follows. We must assume that the court was advised of the character, professional standing, and learning of Dr. Fraser, and was satisfied with his qualifications to make the examination, and that he would honestly and fairly testify to the results. But, aside from that, it was not shown that the court was

Name—Remarks
by Court.Name—Bias of
Witness.

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informed at the time the commission was appointed that Dr. Fraser had any knowledge of plaintiff's injuries. The witness, before detailing the result of his examination, informed the parties that he had previously made a physical examination of plaintiff, and no objection was then or afterwards made by defendants to his qualification. In the circumstances we must hold that defendants waived all objection to the qualifications of the witness to make a fair and unbiased examination. They took their chances on the result of the examination, and cannot be allowed to elect to accept it if favorable and exclude it if unfavorable. In paragraph 5 of the opinion in this case on the former appeal it is held that, under the undisputed evidence in the case, there was no reversible error in the third instruction.

The same instruction was given on the retrial. Defendants still insist that the instruction

Defective Plat-
form—Negligence
as a Matter of Law.

is erroneous, in that it assumes, as a matter of law, that the hole in the platform was unsafe and dangerous, and in that it did not allow them a reasonable time in which to make repairs. They say that the opinion is in conflict with one condemned in the case of *James v. Railway Co.*, 107 Mo. 485, 18 S. W. 31, in which it was held to have been a question for the jury to determine whether it was negligence on the part of a railway company to construct and maintain a station platform of planks having auger holes through them from 1½ to 2 inches in diameter. In this case defendants' agent in charge of the station, and other of its employees, testified that the hole in the platform was six feet long and eight inches wide, and that it was made by themselves, in moving heavy freight, four days before the accident. The difference in the facts under which the respective instructions were given is manifest. The facts in this case stand virtually admitted by the evidence of defendants' employees, and are disputed by no witness. The simple question, then, is whether defendants were guilty of negligence, as a matter of law, in leaving for four days, unguarded and unlighted, a hole, of the character described, in

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their station platform, which was about four feet above the ground, and over which passengers were required to pass on leaving trains. We thought so on the first hearing, and we are still of the same opinion. Defendants owed to the public the duty of keeping their platform in a reasonably safe condition. A failure to perform this duty was negligence. That the duty was not performed stands virtually admitted. It was said in the James Case, *supra*, that the court could not assume "that it is negligence to permit a hole to remain in a railroad station platform." The decision must be interpreted in the light of the facts upon which it was rendered. The "hole" the court had in mind was made with an auger, and was only from 1½ to 2 inches in diameter, while the "hole" the court had in mind in this case was 8 inches wide and 6 feet long. Under the facts in the former case it was questionable whether the platform was not in a reasonably safe condition for the uses to which it was ordinarily applied; in the case at bar the dangerous condition of the platform is apparent to any reasonable mind. Defendants were undoubtedly entitled to a reasonable time in which to repair the platform and put it in a reasonably safe condition. What would be a reasonable time in any case will depend upon the character of the required work. Defendants' agents caused the defect, and knew of its existence for at least four days before the accident. This was ample time in which to have made the trifling repairs necessary. The defect was dangerous, and threatened every passenger who left the train, and due care required at least some kind of warning to them of the danger. None whatever was given, though the train, upon which plaintiff was a passenger, arrived in the nighttime. In the circumstances the negligence of defendants could properly have been declared as a matter of law.

3. A number of physicians were examined as experts, who gave to the jury their opinion as to the character, effect, and permanency of plaintiff's injuries. In respect to the weight to be given their evidence the court instructed the jury as follows: "With respect to expert

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testimony, or, in other words, the opinion of the doctors, you may take into consideration whether such opinions are supported or refuted by other testimony in the cause. You may also take into consideration the professional learning, skill, ability, and experience of such experts." Counsel makes this instruction a basis for the argument of several propositions of law in respect to the admissibility of expert testimony, and the necessary qualifications of a witness to testify as an expert. The competency of the witnesses to testify as experts was a question for the court to decide. The weight to be given to their testimony was to be determined by the jury. If, after an examination, defendants were of the opinion that a witness was not shown to be competent to testify as an expert, objection should have been made to his competency at the time, and all the evidence given in support of his qualification should have been preserved, in order that the appellate court could pass upon the exception. The qualification of such witness cannot be raised by an instruction directing the jury as to the weight to be given such evidence. **Expert Testimony.** It is argued that in no case should expert or opinion testimony be received except it be based upon facts clearly proved. The legal proposition here asserted applies only to hypothetical questions put to an expert witness, based upon the evidence. Even in such case it is not essential that the facts be clearly established. A sufficient basis for the opinion of an expert is established when the evidence tends to prove all the facts upon which the opinion is hypothecated. *Russ v. Railway Co.*, 112 Mo. 48, 20 S. W. 472. It may be agreed that the evidence of experts would be entitled to much greater weight, and the result of trials would be much more satisfactory, if the witnesses were disinterested and unbiased, as well as learned and skillful; but the same may be said of any other witnesses. If they would all speak the unqualified and unbiased truth, justice would seldom fail. But witnesses, whether they testify to facts or give their opinions as experts, are not always unbiased or truthful, and the jury must

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determine the weight to be given to their evidence. Counsel say, and correctly, that expert testimony is admitted as a necessity, and should always be received and considered with great caution. It is nowhere shown that the evidence introduced on this trial was not competent. The witnesses were all, so far as appears, respectable physicians, and the subject was one which properly called for the testimony of experts. Such witnesses were called and examined by both parties, without objection, and, as heretofore said, there is no basis for the objection to their competency. If defendants thought the jury should have been cautioned in respect to the weight to be given to the testimony, they should have asked an additional instruction. In civil cases courts are not required to give instructions unless requested. We find no error in the instruction complained of.

Duty to instruct.

4. Defendants insist with much earnestness that the court committed error in the instructions given to the jury in respect to the measure of damages. It is said that the fourth instruction assumes that the plaintiff suffered physical pain and inconvenience and mental anguish from his injuries. The instruction requires the jury to find that plaintiff suffered physical injuries from falling into the hole in the platform. The allowance of any damages is made to depend upon those facts. The jury was further instructed that in estimating the damages, "You may take into consideration and account * * * his bodily and mental pain, if you believe from the evidence such is the fact." It must be agreed that the rule thus given for the guidance of the jury is not entirely clear, but the jury must have understood from it that they could only allow damages for such pain, physical and mental, as plaintiff actually suffered. But, if plaintiff was injured, as charged, which fact the jury was required to find, there would be no reversible error in the instruction, though physical and mental pain, as a result, was assumed. Pain is the natural result of such injuries as the evidence tends to prove plaintiff suffered, and may fairly be assumed to follow as a necessary consequence.

Instructions—Assumptions.

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5. Defendants requested the court to instruct the jury that, in order for plaintiff "to recover any damages in this cause for permanent injury or permanent mental suffering or physical pain he must show that he took proper and immediate steps to have his condition improved, and did all that a prudent and careful person would have done to have his injuries cured, and himself restored to good condition of health." The court refused to give this instruction, and correctly. An injured person should use reasonable care to prevent an aggravation of his injuries, and will not be allowed to recover compensation for such as could have been avoided by the exercise of such care and prudence. Aggravation of injuries by subsequent negligent conduct on the part of plaintiff may be considered by the jury in mitigation of damages. But to require one who has been injured to take proper and immediate steps to prevent future consequences is demanding of him a degree of care and an infallibility of judgment which the most skillful physician does not possess. The law requires nothing so unreasonable. The court, on its own motion, instructed the jury on this question as follows: "If you believe from the evidence that his injuries have been aggravated, and his pain and suffering enhanced, by his own imprudence, or want of ordinary care, then for such increase of pain, or for such aggravation of injury he cannot recover." This instruction declares the correct principle of law as far as it goes. If defendants had wished to have the jury instructed in respect to the duty of plaintiff in the matter of caring for his injuries, a proper instruction should have been requested. The duty of plaintiff can, however, be very easily inferred from the instruction given.

Permanent Injuries—Subsequent Contributory Negligence.

6. We have considered the evidence and the instructions on the question of damages very carefully, in view of the large amount of the verdict, in order to see if anything appeared therefrom to indicate that the verdict was the result of passion or prejudice. The evidence shows that the

Injuries and Verdict.

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injuries were not, at first, regarded as being serious but that the condition of plaintiff has continued to grow worse, until, according to the evidence of some of the physicians who examined him, and that of plaintiff himself, he suffers from incontinence of urine, injury of the spine, insomnia, impairment of memory, loss of sexual powers, and hernia. The evidence tends also to prove that plaintiff's physical and mental condition is the result of the injury complained of, and that the injury to the spine is permanent and progressive. If the facts testified to were believed by the jury, and if the opinions of the expert witnesses were accepted as correct,—and these were matters for the jury to determine,—then we cannot say that the amount of the verdict shows conclusively that it was the result of passion, prejudice, or sympathy of the jury. This is the second verdict on substantially the same evidence. The first was for \$15,000. Each of the verdicts was approved by the trial court, and this court has no power to interfere with the result of the trial for the reason alone that the verdict appears to us to be larger than is justified by the evidence. The judgment is therefore affirmed. All concur.

NOTES.

Liability of Company for Injuries Caused by Defective Platform.—It is the duty of a company, without an order from the railroad commission, to provide platforms, or suitable substitutes therefor, at stopping places where it is accustomed to receive and discharge passengers, and to furnish proper lights when trains arrive or depart in the night; and the neglect of this duty is negligence. *Ensley R. Co. v. Chewning*, 50 Am. & Eng. R. Cas. 46, 93 Ala. 24, 9 So. Rep. 458.

Where a company allows a hole to remain in its platform until a passenger steps in it and is injured, it is error to charge the jury that the company was not liable "unless it fail to use ordinary care after being aware of plaintiff's danger." The negligence in allowing the hole to remain was the proximate cause of the accident, whether that was before or after the danger to plaintiff was known. *Louisville & N. R. Co. v. Wolfe*, 80 Ky. 82.

Plaintiff, a passenger, in attempting to step from the car to the station platform, missed the platform, fell between it and the car, and was injured. The distance between the platform and the car

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was eleven inches. The lower step of the car was eight inches below the top of the platform, and one foot seven inches distant therefrom. The second step was about four inches below the platform and two feet two inches therefrom. Plaintiff stepped from the second step without having hold of the iron railing on either side, and without looking to see the station platform. The platform had been used for many years, and prior to the accident no one had been injured or had suffered any inconvenience. It did not appear but that the platform was constructed in the ordinary way, or that the space between it and the car was more than was requisite, and there was no complaint that the platform was out of order. *Held*, that the facts did not justify a verdict for plaintiff. *Laffin v. Buffalo & S. W. R. Co.*, 30 Am. & Eng. R. Cas. 596, 106 N. Y. 136, 7 Cent. Rep. 793, 12 N. E. Rep. 599, 8 N. Y. S. R. 596; *Kelly v. Manhattan R. Co.*, 112 N. Y. 443, 20 N. E. Rep. 383, 21 N. Y. S. R. 507.

A land company having built a hotel at a railroad station, which was used as an eating-house for passengers, and having constructed two bridges or platforms over a small stream which ran between the hotel and the track, using and keeping one of them in repair, while the other was used and was to be kept in repair by the railroad company, being built on its right of way, an action for damages lies against the railroad company, but not against the land company, at the suit of a passenger who, having gone over the first bridge into the hotel, received personal injuries from a defect in the other as he was returning to the cars; nor is the passenger chargeable with contributory negligence because he "could have seen the hole if he had been specially looking for it," when the evidence shows that the accident occurred at night, and that there was no light or other warning signal posted at the spot. *Watson v. East Tenn., V. & G. R. Co.*, 92 Ala. 320, 8 So. Rep. 770. And see *Peniston v. Chicago, St. L. & N. O. R. Co.*, 34 La. Ann. 777. See also *Atchison, T. & S. F. R. Co. v. Shean*, 58 Am. & Eng. R. Cas. 360, 18 Colo. 368, 33 Pac. Rep. 108.

See also 8 Am. & Eng. R. Cas. *note*, 550 *et seq.*

The general rule is that companies must make their station grounds, approaches and platforms safe, or, as some of the cases put it, reasonably safe. *McDonald v. Chicago & N. W. R. Co.*, 26 Iowa 124; *Pennsylvania Co. v. Marion*, 123 Ind. 415, 23 N. E. Rep. 973; *Delaware, L. E. & W. R. Co. v. Trautwein*, 52 N. J. L. 169, 7 L. R. A. 435, 19 Atl. Rep. 197; *Collins v. Toledo, A. A. & N. M. R. Co.*, 80 Mich. 390, 45 N. W. Rep. 178; *Moses v. Louisville, N. O. & T. R. Co.*, 39 La. Ann. 649, 2 So. Rep. 567; *Alexandria & F. R. Co. v. Herndon*, 87 Va. 193, 12 S. E. Rep. 289; *Texas & P. R. Co. v. Brown*, 78 Tex. 397, 14 S. W. Rep. 1034; *Dillaye v. New York C. R. Co.*, 56 Barb. (N. Y.) 30; *Hulbert v. New York C. R. Co.*, 40 N. Y. 145; *Moore v. Wabash, St. L. & P. R. Co.*, 84 Mo. 481; *Cross v. Lake Shore & M. S. R. Co.*, 69 Mich. 363, 37 N. W. Rep. 361; *Hoffman v. New York C. & H. R. R. Co.*, 75 N. Y. 605.

Aggravation of Injuries by Plaintiff's Negligence.—But, while the negligence of the injured person contributing proximately to his injury will bar his recovery of damages, it is held that when he was guilty of no negligence contributing to the injury, negligence upon his part after the injury, by which it is aggravated, will not prevent him from recovering damages for so much of the injury as the

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original wrong-doer caused by his negligence. Shearman & Redf. on Neg. § 32 and note; Beach on Cont. Neg. 64; Stebbins *v.* Cent. Vt. R. Co., 54 Vt. 464; s. c., 11 Am. & Eng. R. R. Cas. 79; 41 Am. Rep. 855; Greenland *v.* Chaplin, 5 Exch. 243; Thomas *v.* Kenyon, 1 Daly (N. Y.), 132; Sills *v.* Brown, 9 Car. & P. 601; Secord *v.* St. Paul, etc., R. Co., 5 McCrary (U. S.), 515; s. c., 18 Fed. Rep. 221; Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 424, 425; s. c., 23 Am. & Eng. R. R. Cas. 522.

In such cases it seems that the damages may be apportioned or allowance made by the jury for that portion of the injury due to plaintiff's fault. Beach on Contributory Negligence, page 73, § 24; L. N. A. & C. R. Co. *v.* Falvey, 104 Ind. 409; s. c., 23 Am. & Eng. R. R. Cas. 522; Gould *v.* McKenna, 86 Pa. St. 297; s. c., 27 Am. Rep. 705, 706; Nitro-Phosphate Co. *v.* Docks Co., 9 L. R. Ch. Div. 503; Hunt *v.* Lowell Gas Co., 1 Allen (Mass.), 343; Chase *v.* N. Y., etc., R. Co., 24 Barb. (N. Y.) 273; Sherman *v.* Fall River Iron Co., 2 Allen (Mass.), 524; Matthews *v.* Warner, 29 Gratt. (Va.) 570; s. c., 26 Am. Rep. 396; Hibbard *v.* Thompson, 109 Mass. 286; Fay *v.* Parker, 53 N. H. 342; s. c., 16 Am. Rep. 270, 287, 288.

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v.

BILLINGS.

(Court of Appeals of Kansas, Feb. 15, 1898.)

Injuries to Stock—Duty to Construct Cattle Guards.*—Gen. St. 1889, par. 1259, imposes the duty upon a railroad company to build cattle guards where necessary whenever its line of railroad passes through a fenced field, whether such field is inclosed before or after such railroad is constructed.

Same—Damages.—Railway Co. *v.* Behney, 28 Pac. 980, 48 Kan. 47, followed as to character of damages recoverable.

Conflict Between Verdict and Findings—Appeal.—Where the general verdict is supported by sufficient evidence, and has received the approval of the trial court, a conflict between the special findings and such verdict must clearly appear to be material to warrant the granting of a new trial.

(Syllabus by the Court.)

ERROR by defendant from Montgomery county district court. *Affirmed.*

*See notes at end of case.

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A. A. Herd, O. J. Wood, and W. Littlefield, for plaintiff in error.

O. P. Ergenbright and A. B. Clark, for defendant in error.

MILTON, J. On the trial of this action, at the 1893 term of the Montgomery county district court, Louis Billings, as plaintiff, recovered a judgment in the sum of \$346 against plaintiff in error, as defendant, based on a verdict of a jury, as damages on account of the failure of the defendant company to construct cattle guards at three points where its line of road runs through three contiguous tracts of land of said plaintiff, one point being a highway, and all of said tracts being inclosed by fences. Defendant's motion for judgment upon the special findings, and its motion for a new trial, having been overruled, the case is brought here for review.

Plaintiff owned 140 head of cattle, which he endeavored to keep within his inclosed field, to be pastured and fed, but very frequently they escaped through the openings where the cattle guards should have been placed, and had to be recovered and returned by Billings or some one in his employ. These persons also put forth efforts at different times to keep the cattle away from the said openings in the fence, to prevent their escaping. On account of these items, plaintiff alleged his damage to be \$500. He also sought to recover \$200 because of the depreciation in the value of his cattle caused by their being driven practically every day from November 15, 1891, to May, 1892, as a result of their escaping from the inclosure; \$150 for the value of 11 of his cattle that had died from being excessively driven; and \$300 on account of increased feeding made necessary by the foregoing,—all alleged to be in consequence of the failure of the company to build the cattle guards. The jury found that Billings was entitled to recover for 173 days' work of a man and horse in driving the cattle back to and keeping them within the inclosure, and that the proper amount of the recovery was \$346. Nothing was allowed for the other items, although the

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court had covered all the said items in its instructions. The evidence showed that by making an outlay of \$104 for a fence along the right of way, and by losing the use of 37 acres of pasturage, worth 50 cents an acre, Billings could have kept the cattle from escaping, and thus have avoided damage. The court instructed the jury concerning this point, but they found that, while the damage might have been prevented in that way, Billings was not negligent in failing to build the fence. The last part of this finding has some support in the evidence. It was proven that, in the summer of 1891, Billings informed the section foreman who had charge of the track which extended over the premises in question that he expected to inclose the same at an early date, and requested to have cattle guards built at certain designated points. The foreman reported the conversation and request to the company's roadmaster, who with the division superintendent, came on a train to the station nearest the land sometime afterwards, and, meeting the section foreman, asked him to go with them on the train and show them where the cattle guards would be needed. The foreman complied with all the particulars of this request. Thereafter the said division superintendent wrote the following letter to Billings: "Chanute, Kansas, Nov. 20th, 1891. Louis Billings, Cherryvale, Kansas—Dear Sir: In reply to yours of Nov. 17th, in relation to cattle guards, fencing, etc., through your land, would say that correspondence on this subject has been referred to me, and I have taken the matter up with our Gen. Supt., with a view of either fencing through your land, or building cattle guards, as you request; and I believe it will be better for the company to build the fences than to put in cattle guards, as you could at any time, after we build the cattle guards, demand the fences, and we are obliged to build them, or you could do the same, and collect from the company. But, in taking this matter up, I wish to say to you that, if we build the fences, it will be necessary for us to build it on the line of our right of way, which is 200 feet wide through your farm. If

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you do not prefer for us to build this fence, I would be glad to have you say so. Of course, the matter rests entirely with you. I had hoped to have seen you, but have not done so. Yours, truly, J. L. Barnes, Superintendent." As the company introduced no evidence, and as it appears that it fenced its right of way through the Billings land some time in the year 1892, without any further notice from Billings, we think it clear that the railroad company had sufficient knowledge of the fact that the land was fenced to impose upon it the duty of building the cattle guards before the end of the year 1891. Gen. St. 1889, par. 1260, provides that in an action to recover damages for failure to build cattle guards, in order to enable the injured party to recover all damages he has sustained by reason of such failure, it shall only be necessary for him to prove neglect or refusal on the part of the company to construct such cattle guards. "Neglect," as used in this paragraph, certainly implies previous knowledge, not necessarily notice of any particular kind. We think neglect in this regard was sufficiently proven.

The principal question discussed by counsel for the company in their brief, and orally before the court, is this: Does paragraph 1259, Gen. St. 1889, require that a railroad company shall build cattle guards where it enters and leaves inclosed premises, in case such land is fenced after the railroad is built? Said paragraph reads as follows: "When any railroad runs through any improved or fenced land, said railroad company shall make proper cattle guards on such railroad when they enter and when they leave such improved or fenced land." Counsel say that the word "when," in this section, relates to the time, and is not equivalent to "where," and that, while the statute would require a railroad company to place cattle guards at the points where its road enters and leaves a fenced tract when the road is being built, it does not impose such a duty where the land is fenced after the road is built. The paragraph quoted was passed in 1869. The railroad

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track in question was constructed in 1871. Counsel say that the act of March 7, 1885, which requires railroads to fence their right of way under certain conditions therein named, supports this claim. They argue that fencing the right of way would make the building of cattle guards unimportant to the owner of the land affected. As we understand the decisions of our supreme court, the question here raised is not an open one in this state. In the case of *Railway Co. v. Morrow*, 32 Kan. 217, 4 Pac. 87, the evidence showed that the railroad was constructed in 1870 by the Missouri, Kansas & Texas Railway Company, and that it was operated after 1881 by the Missouri Pacific Company. At the time the railroad was constructed, the land occupied by Morrow was unimproved and unfenced, and was not fenced until April, 1882. The fence was built on each side of the railroad up to the right of way, where spaces were left for cattle guards. Morrow claimed damages for injuries done to his crops by cattle passing along the right of way into his field and upon his crops, and also for his time and labor in keeping the cattle away from his field, by watching the field, and in building an additional fence. It was contended that, since the railroad company was operating the road under a lease, it was not bound, under the statute, to construct cattle guards on its line of road. The court, after quoting paragraph 1259, *supra*, said: "The defendant, plaintiff in error, also cites the case of *Railway Co. v. Curl*, 28 Kan. 622, as authority for this position. Now, it is generally true, as decided in that case, that, when a railway company constructs a railway, it is bound to construct proper cattle guards; but this principle of law does not apply to the present case, for during all the time that the Missouri, Kansas & Texas Railway Company, the constructor of this road, operated the same, the land which now constitutes the plaintiff's field was neither improved nor fenced. But, whatever may be the duty of a railway company constructing a railway, we think it is always the duty of a railway company operating the same to see that proper cattle guards

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exist whenever its railway enters or leaves improved or fenced land; and, taking this view of the case, it was the duty of the defendant to see that proper cattle guards were in existence where its railway entered and left plaintiff's field." And in the syllabus of the case the court said: "It is always the duty of a railway company operating a railroad to see that proper cattle guards exist wherever its railroad enters or leaves improved or fenced land, whether such railway company owns the railroad or is simply operating it under a lease." In other cases the court has used language of similar import from which it must be inferred that the construction it put upon paragraph 1259 is that it applies as well where the land is fenced after the road is built as where it was fenced at the time the road was built. The word "when" has the meaning of "whenever" in this connection, and the duty to place cattle guards devolves on a railroad company whenever the line of railroad runs—that is passes—through an inclosed field, without regard to when such inclosure was made. In the case of *Railway Co. v. Behney*, 48 Kan. 47, 28 Pac. 980, the court sustained a judgment in favor of the plaintiffs, and against the railroad company, where the damages alleged to have been sustained were exactly like those for which the recovery was had in this case. In *Nelson v. Railway Co.*, 49 Kan. 165, 30 Pac. 178, the decision in the *Behney* Case was affirmed, and a recovery of the same character sustained.

Same—Damages.

It is claimed by counsel for plaintiff in error that the findings of fact are in conflict with the general verdict. We have given this matter very careful attention, and have concluded that the conflict is immaterial.

While the verdict is for more than the cost of fencing the right of way and the value of the pasture which would have been thus lost, it is plain from the evidence that Billings was expecting, and had a right to expect, a speedy building of the cattle guards. Under the doctrine of the two cases last cited, he was entitled to all the damages

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awarded him; and it is doubtful if the instruction of the court hereinbefore mentioned, in reference to the claim that Billings ought to have built a fence along the right of way, and thus prevented the alleged damage, was correct. The judgment of the district court is affirmed. All the judges concurring.

NOTES.

Duty of Railroad Companies to Construct and Maintain Cattle-Guards.—In the absence of statute there is no obligation on the part of the railroad company to maintain cattle-guards (see note to *Johnson v. Chicago & N. W. R. Co.*, 55 Am. & Eng. R. Cas. 132-134), and in absence of contract or charter of obligations in respect thereto, such duty will not be implied from the fact that the company has constructed them along the line of the road where it enters and leaves cultivated fields unless the lapse of time has raised the presumption of a grant or covenant. See *Ward v. Paducah & M. R. Co.* (Tenn.), 4 Fed. Rep. 862. But where the statute imposes upon a railroad company the duty to fence its track, it also imposes upon it the obligation of making and keeping in repair suitable cattle-guards. See *Louisville, N. A. & C. R. Co. v. Porter Township*, 97 Ind. 267; s. c., 20 Am. & Eng. R. R. Cas. 446; *White Water R. Co. v. Bridgett*, 94 Ind. 216; s. c., 20 Am. & Eng. R. R. Cas. 443; *Pittsburgh, C. & St. L. R. Co. v. Eby*, 55 Ind. 567; *Indianapolis & C. R. Co. v. Kibbey*, 28 Ind. 480; *Indianapolis, P. & C. R. Co. v. Irish*, 26 Ind. 268; *New Albany & S. R. Co. v. Pace*, 13 Ind. 411; *Louisville, N. A. & C. R. Co. v. Spair*, 61 Iowa, 467; *Mundhenk v. Central Iowa R. Co.*, 57 Iowa, 718; s. c., 11 Am. & Eng. R. R. Cas. 463; *Missouri Pac. R. Co. v. Manson*, 31 Kan. 337; s. c., 13 Am. & Eng. R. R. Cas. 540; *St. Louis, W. & W. R. Co. v. Curl*, 28 Kan. 622; s. c., 11 Am. & Eng. R. R. Cas. 458; *Union Pac. R. Co. v. Harris*, 28 Kan. 206; s. c., 11 Am. & Eng. R. R. Cas. 431; *St. Louis & S. F. R. Co. v. Shoemaker*, 27 Kan. 677; s. c., 11 Am. & Eng. R. R. Cas. 379; *St. Louis & S. F. R. Co. v. Sharp*, 27 Kan. 134; s. c., 13 Am. & Eng. R. R. Cas. 595; *St. Louis & S. F. R. Co. v. Edwards*, 26 Kan. 72; s. c., 7 Am. & Eng. R. R. Cas. 547; *Watier v. Chicago, St. P. M. & O. R. Co.*, 31 Minn. 97; s. c., 13 Am. & Eng. R. R. Cas. 582; *Clary v. Burlington & M. R. Co.*, 14 Neb. 232; s. c., 11 Am. & Eng. R. R. Cas. 493; *Fremont E. & M. V. R. Co. v. Lamb*, 11 Neb. 592; s. c., 5 Am. & Eng. R. R. Cas. 367; *Railroad Co. v. Newbrander*, 40 Ohio St. 15; s. c., 11 Am. & Eng. R. R. Cas. 480; *Lake Shore & M. S. R. Co. v. Sharpe*, 38 Ohio St. 150; s. c., 7 Am. & Eng. R. R. Cas. 543; *Texas & St. L. R. Co. v. Young*, 60 Tex. 201; s. c., 13 Am. & Eng. R. R. Cas. 544; *Dunnigan v. Chicago & N. W. R. Co.*, 18 Wis. 28.

In Streets of Towns and Villages.—Where cattle-guards can be constructed in the streets of a town or village without interfering with ordinary traffic, the company is required to construct and maintain them. See *Indianapolis, P. & C. R. Co. v. Lindley*, 75 Ind. 426; s. c., 14 Am. & Eng. R. R. Cas. 495; *Toledo, W. & W.*

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R. Co. *v.* Owen, 43 Ind. 405; Jeffersonville, M. & I. R. Co. *v.* Parkhurst, 34 Ind. 501; Toledo, W. & W. R. Co. *v.* Howell, 38 Ind. 447; Madison & I. R. Co. *v.* Kane, 11 Ind. 375; Flint & P. M. R. Co. *v.* Lull, 28 Mich. 510; Tracy *v.* Troy & B. R. Co., 38 N. Y. 433; Bradley *v.* Buffalo, N. Y. & E. R. Co., 34 N. Y. 427; Brace *v.* New York C. R. Co., 27 N. Y. 269; Cleveland & P. R. Co. *v.* McConnell, 26 Ohio St. 57; Hayes *v.* Michigan C. R. Co., 111 U. S. 228; bk. 28, L. ed. 410; s. c., 15 Am. & Eng. R. R. Cas. 394.

In those cases, however, where such constructions would interfere with or impede the free use of the streets by the public, the railroad company is not required to maintain them. See Peoria, P. & J. R. Co. *v.* Barton, 80 Ill. 72; Towns *v.* Cheshire R. Co., 21 N. H. 363; Parker *v.* Rensselaer & S. R. Co., 16 Barb. (N. Y.) 315; Vanderker *v.* Rensselaer & S. R. Co., 13 Barb. (N. Y.) 390; Crawford *v.* New York C. R. Co., 18 Hun (N. Y.), 100; Halloran *v.* New York R. Co., 2 E. D. Smith (N. Y.) 257.

For full discussion of the obligation of railways to construct and maintain cattle-guards at crossings and in cities, see 7 Am. & Eng. Enc. of L., tit. FENCES, II, 2, (d), iii.

Same—Statutes, Constitutionality of.—A statute which imposes upon railroad companies an absolute liability, irrespective of negligence, for the full amount of damages proven to have been sustained by abutting owners, upon whose land cattle have strayed through cattle-guards which the railroad companies are required to construct, is unconstitutional. Birmingham Mineral R. Co. *v.* Parsons, 56 Am. & Eng. R. Cas. 223, 100 Ala. 662, 13 So. Rep. 602.

A statute declaring that all railroads within the state "shall be required to put in cattle or stock guards upon their respective lines of roads, and keep the same in good order, whenever the demand is made upon them or their agents or employees by the owners of the land through which said road passes that said cattle or stock guard is necessary to prevent the depredation of stock upon their farms," is not unconstitutional for the reason that it makes the landowner the sole judge of the necessity of the fence, since, if the necessity for the fence was not left to the discretion of the abutting owner, the railroad company would be absolutely compelled to maintain the guards in question. Birmingham Mineral R. Co. *v.* Parsons, 56 Am. & Eng. R. Cas. 223, 100 Ala. 662, 13 So. Rep. 602.

Kan. Comp. Laws 1879, ch. 84, entitled "An act to require railroad companies to make cattle-guards and to pay damages that individuals may sustain," and providing in § 38 that where any railroad crosses any public highway the company shall construct crossings, is unconstitutional as containing a subject not expressed in its title. Missouri, K. & T. R. Co. *v.* Long, 6 Am. & Eng. R. Cas. 254, 27 Kan. 684.

Interpretation of Statutes.—Cattle-pits are embraced in the term "fence," though not specially mentioned in a statute. New Albany & S. R. Co. *v.* Pace, 13 Ind. 411.

The only purpose of the law as to the construction of cattle-guards (arts. 4240, 4241, Tex. Rev. St.) is to protect the inclosures through which the road passes, and the absence of cattle-guards is not negligence or evidence of it. Ward *v.* Bonner, 80 Tex. 168, 15 S. W. Rep. 805.

Conn. act of 1850, § 3 (Comp. Laws 1854, p. 753), which provides that all railroad companies shall construct cattle-guards at high-

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way crossings, unless in the opinion of the railroad commissioners it shall be unnecessary, applies to railroad companies incorporated before as well as those incorporated after the passage of the act. It works an alteration of the charter of a previously incorporated company which did not impose the duty, but contained a provision that it might be altered at the pleasure of the legislature. *Bulkley v. New York & N. H. R. Co.*, 27 Conn. 479.

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v.

MARCHANT.

(Circuit Court of Appeals, Second Circuit, Jan. 25, 1898.)

Injury to Passenger—Damages—Request and Charge.—In an action against a railroad company for physical consequences claimed to have resulted from injuries sustained by plaintiff while its passenger, the court refused defendant's request to charge that "if the jury find as a fact that although the plaintiff suffered a fright, yet sustained no bodily injury whatever, then the plaintiff is entitled to no more than nominal damages;" but charged, in substance, that if the injuries complained of were not the result of the fall and shock which he received when thrown from his berth he was only entitled to recover nominal damages for the pain and mental suffering consequent upon the fall. *Held*, that the request was covered by the charge.

Medical Experts—Exception to Testimony.—A medical expert when asked the probable future course of plaintiff's disease, which the latter claimed had resulted from such fall, replied that plaintiff would never recover, and added, "so far as to be capable of any sort of persistent occupation." *Held*, that the additional remark was not subject to the objection of being a second speculative opinion based upon a first opinion.

Austin Fox, for plaintiff in error.

Artemus B. Smith, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Between 3 and 4 o'clock in the morning of September 20, 1893, while the plaintiff was being carried as a passenger on one of the trains of the defendant, and was occupying a berth in a state room of one of its sleeping cars, the train came into collision with

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another train of the defendant, through its negligence. The plaintiff was thrown from his sleeping berth upon the floor of the sleeping car, fell upon his back upon a pair of shoes which lay on the floor, and sustained an injury, "which, according to his testimony, though not specially severe at the time, developed into so grave an injury to the spinal cord that it practically ruined" his active life. No question was made by the defendant upon the trial in regard to its negligence, nor in regard to its liability for some slight and unimportant injury which might have been received from the fall, but the nature, magnitude, and permanence of the ill effects which were claimed to have resulted from the collision were stoutly denied by the defendant, and to this subject the conflicting testimony was directed.

Upon cross examination the plaintiff was asked: "Now, this accident: Were you badly frightened by it?" to which he replied, "Yes, sir." Upon cross-examination of the defendant's medical expert, who thought that the plaintiff was not suffering from an injury to the spinal cord, but from an injury in the brain, answers were made to cross-questions as follows:

"Q. To what sort of an injury in the brain do you attribute his present condition? A. Some emotional shock, or something of that kind. Q. Are there a variety of emotional shocks that might produce this trouble? A. Yes, sir. Q. Would a sudden fear of sufficient extent produce it? A. Yes, sir. Q. Might any great sudden nervous shock produce it? A. Yes, sir. Q. Might a shock to a passenger in a car, brought suddenly up with a terrific crash and a sudden shock, produce it? A. Yes, sir."

This was the whole testimony about fright or its effects. The defendant asked the court to charge the jury as follows:

"If the jury find as a fact that although the plaintiff suffered a fright, yet sustained no bodily injury whatever, then the plaintiff is entitled to no more than nominal damages."

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The court declined to give this request, to which refusal exception was duly taken. By this

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request the court was asked to charge that the plaintiff could not recover substantial damages, whatever his condition at the trial, if, as a matter of fact, he sustained no bodily injury at the time of the collision, although he suffered a fright. The court declined to give this request, to which refusal exception was duly taken. An examination of the record shows that in the testimony and by the charge the case was made to turn upon the fact and the consequences of bodily injuries received at the time of the collision. These injuries were admitted to have been apparently slight at the time of the collision, but it was claimed by the plaintiff that grave consequences ensued from them. The defendant urged that the extent of the injuries was exaggerated, or possibly simulated, or that they must have been produced by other causes than the slight apparent injuries at the time of the accident. The court charged :

“If, upon the whole testimony, there is not a fair preponderance of evidence, sufficient to satisfy you that the injuries of which he complains were the result of the fall and shock which he received when thrown from his berth, then he is only entitled to recover, as I said before, for the trifling damages which are involved in the fall, and the pain and mental suffering, if there was any, consequent upon the fall.”

The jury were also told that if the fall and the shock did not produce the plaintiff's existing condition, and if that condition was due to other causes than the shock and the injury which he received from the accident, then he was only entitled to recover comparatively trifling damages. The jury were thus informed that the suit was brought to recover damages for serious physical consequences which were claimed to have resulted from the injuries to the bodily, and not to the mental, system, which were received at the time of the collision, and, if the serious consequences did not result from these bodily injuries, the plaintiff's case had no importance.

But the defendant urges that by the request it was intended to press upon the attention of the court the

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principle which has been enunciated in some recent decisions, that, although physical ills resulted from the fright, a plaintiff cannot recover damages for such physical ills so resulting from fright caused by a negligent act, if no bodily injury was received at the time; and that the attention of the jury was not sharply directed to this point, and that they might have supposed that the plaintiff was entitled to damages resulting from any physical ills which grew out of the collision, whether they were caused by fright alone or by injury to the bodily system. We may assume that the doctrine which is said to have been declared in *Mitchell v. Railway Co.*, 151 N. Y. 107, 45 N. E. 354; *Ewing v. Railway Co.*, 147, Pa. St. 40, 23 Atl. 340, and in other cases, must have been presented to the trial judge, and that there was no misunderstanding as to the intent of the request; but it is also true that he expressly told the jury that, if the fall and the shock did not produce the plaintiff's existing condition, and if that condition was due to other causes than the shock and the injury which the plaintiff received from the accident, then he was only entitled to recover comparatively trifling damages; that is to say, unless there was a direct causal connection between the existing condition and the trifling injuries which immediately followed the fall, there could be no recovery for the serious injuries existing at the time of the trial. We think that the request, as intended to be made, was covered by the charge. We do not intend as an appellate court, to express an opinion as to the soundness of the doctrine which was sanctioned in the cases cited *supra*. Dr. Charles Phelps, a medical expert, was examined in behalf of the plaintiff, and a part of the examination was as follows:

“Q. From your medical knowledge and experience, and from your examination of the plaintiff's case and his present condition, can you state what, in your opinion, with reasonable certainty will be the probable course in the future of the disease with which he is now suffering? A. Yes; I think I can form an intelli-

Medical Experts—
Exceptions to testi-
mony.

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gent opinion. Q. Please state your opinion. A. I think he will never recover, so far as to be capable of any sort of persistent occupation. Whether this disease will progress until it becomes a fatal disorder, within a reasonable length of time, say a few years, or not, I cannot say, and I have no opinion, because its course is variable. Q. As to the fatal termination of it, you have no opinion? A. As to the time of its termination, I could not state an opinion.' The counsel for the defendant thereupon moved to strike out the testimony of Dr. Phelps that, in his opinion, the plaintiff will never recover sufficiently to be able to follow any persistent occupation, insisting that the said testimony was speculative and conjectural, and too remote. The motion was denied, and the defendant's counsel excepted."

The refusal is made one of the subjects of error. It is not denied that the question was proper, but it is urged that the portion of the answer which was objected to was a speculation of the witness as to the possible effect of the probable course of the disease on the plaintiff's ability to "stand any sort of persistent occupation," and was an opinion upon an opinion. We do not so understand the character of the answer. The witness was asked the probable future course of the plaintiff's disease. He replied that he thought that the plaintiff would never recover, but, in order to state his opinion with the proper limitations and to place clearly before them his opinion in regard to the extent of nonrecovery, he added, "so far as to be capable of any sort of persistent occupation." His opinion was, and it was proper that he should make it clear, that the plaintiff would not be confined to his bed, or would not suffer constant or increasing pain, and would not be deprived of all comfort or enjoyment in life, but would be unable to enter into any business which called for persistency or which required a steady pursuit. The naked answer, "I think that he will never recover," would not have clearly put before the jury the expert's opinion in regard to the future extent or

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character of the disease, and therefore it was proper for him to give his opinion with exactness. The answer was not liable to the charge of being a second speculative opinion based upon a first opinion. The judgment of the circuit court is affirmed, with costs.

LAMBERTSON

v.

CONSOLIDATED TRACTION CO.

(*Court of Errors and Appeals of New Jersey, Nov. 15, 1897.*)

Damages for Personal Injuries—Mental Disturbance.*—When an actionable wrong, consisting of or accompanied by personal injury, is committed, the jury, in fixing the damages therefor, are generally entitled to consider the mental agitation and disorder of the plaintiff naturally and proximately resulting from the wrongful conduct of the defendant.

(Syllabus by the Court.)

ERROR to supreme court. *Affirmed.*

Depue & Parker, for plaintiff in error.

Samuel Kalisch, for defendant in error.

DIXON, J. This suit grows out of the collision which gave rise to the suits brought by Charles Lambertson (38 Atl. 683), and Peter Hoimark (*Id.* 684), just decided, and presents no questions which have not been already disposed of, save the request to charge that no damages could be given for fear, fright, or any physical or mental disorder resulting from fear or fright. The trial judge charged that the only compensation the plaintiff was entitled to was compensation for injuries which resulted from the physical injury caused to the plaintiff by the collision between the wagon in which he was riding and the defendant's car; and we think that, in so doing, he went as far as the defendant had any right

*See note, 8 Am. & Eng. R. Cas., N. S., 218.

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to ask. While there are decisions holding that mere fright cannot form the legal basis of an action for damages (*Mitchell v. Railway Co.* [N. Y. App.] 45 N. E. 354), it is a well-established rule that when an actionable wrong, consisting of or accompanied by personal injury, is committed, the jury, in fixing the damages, are entitled to consider the mental agitation and disorder of the plaintiff naturally and proximately resulting from the wrongful conduct of the defendant. This principle was applied in *Ogden v. Gibbons*, 5 N. J. Law, 598, an action of trespass *quare clausum fregit*, and is constantly applied in suits for seduction, slander, libel, assault, breach of promise of marriage, and the like. In two reported cases this court has expressly sanctioned the principle. *Allen v. Ferry Co.*, 46 N. J. Law, 198; *Railroad Co. v. Walsh*, 47 N. J. Law, 548, 4 Atl. 323. Although in these instances the mental disturbance was only temporary, it certainly cannot the less deserve consideration because it appears to be permanent. The judgment should be affirmed.

MONTANA ORE-PURCHASING CO.

v.

BOSTON & M. CONSOL. COPPER & SILVER MIN.
CO. *et al.*

BUTTE & B. CONSOL. MIN. CO.

v.

MONTANA ORE-PURCHASING CO.

(*Supreme Court of Montana, March 7, 1898.*)

Easements—Right to Lay Water Pipes on Land of Grantor—Construction of Grant.—A grant of a right to flood and store water upon a portion of the land of the grantor, does not authorize the grantee to enter and lay pipes upon other land of the grantor for the purpose of conveying such water from a direction not contemplated in such grant.

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Same—Use of Railroad Embankment as Reservoir Dam*—Injunctions.—A railroad company had a right of way over defendant's land, and plaintiff had a right to use a portion of defendant's land adjoining such right of way for the storage of water. *Held*, that the railroad company could increase the height of its embankment, and allow plaintiff to use it as one side of its reservoir; and that it was not error to refuse to dissolve an injunction prohibiting defendant from putting a flume through such embankment at a point lower than plaintiff's high water mark, there being no evidence that such flume could serve any beneficial purpose.

APPEALS by plaintiff and defendants from Silver Bow county district court.

First case reversed in part and affirmed in part, second case reversed.

John Forbis, Wm. H. De Witt, and Louis Marshal, for appellants.

J. J. McHatton and Robt. B. Smith, for respondent.

HUNT, J. These two appeals were argued together, and by agreement the testimony in case No. 1,175 is to be considered in No. 1,184. They will therefore be disposed of in this one opinion. They are both actions for injunctions. In case No. 1, 175, plaintiff, the Montana Ore-Purchasing Company, had defendant Boston & Montana Consolidated Copper & Silver Mining Company enjoined from interfering with plaintiff in constructing an underground pipe line across certain ground belonging to defendants, and from constructing a box flume through a certain railroad embankment, also constructed on ground belonging to defendants. From an order refusing to dissolve this injunction defendants therein appeal. In case No. 1,184, the Butte & Boston Consolidated Mining Company, as plaintiff, enjoined the defendant the Montana Ore-Purchasing Company from laying pipe for its own use across the same premises involved in case No. 1,175. In this case the court, upon the hearing, dissolved the injunction, from which order plaintiff therein appeals. The respective parties are mining corporations, operating mining and smelting works, the successful conduct

Case Stated.

*See note at end of case.

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of which requires quantities of water. The Butte & Boston Consolidated Mining Company is the owner of the ground over which this controversy arose. But on November 16, 1892, the predecessor in interest of the defendants entered into an agreement and lease with one F. A. Heinze, plaintiff's predecessor in interest, wherein Heinze leased a certain concentrator and smelting plant for a period of years. These works have been used since such time. In the lease and agreement last referred to, there was the following provision: "It is also agreed that the said lessee shall have the right to flood and to store water upon any of the ground of the party of the first part lying east of the embankment of the north leg of the Y of the Northern Pacific Railway, as now constructed; and also the right to dump 'tailings' from any and all works erected on the leased premises by the second party onto any ground of the party of the first part east of the Montana Union Railway Company's tracks and north of the embankment of the Northern Pacific Railway Company above mentioned, to wit, about the place where the 'tailings' from the concentrator of the Boston and Montana Consolidated Copper and Silver Mining Company's lower works are now being deposited; it being the intention of the parties hereto that the rights of storing water and dumping tailings and all rights of any kind mentioned in this indenture are to and shall belong to said second party under any extension of this lease." Prior to the execution of the foregoing lease, to wit, on December 4, 1891, the predecessors in interest of the defendants entered into an agreement and lease with the Northern Pacific and Montana Railway Company, whereby the defendants' predecessors in interest granted and sold to the said railway company an easement for the right of way on, over, and across the premises involved in this action. The mining company, as grantor, reserved to itself the minerals below the surface, and the right to explore for and extract the same, provided that in the exercise of any mining rights there should be no danger to the roadbed of the grantee

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railway company. There was also reserved a right to use such portions of the right of way conveyed as might not be in actual use by the railroad company for railroad purposes, and to dump ore and waste thereon, and to erect necessary buildings and other improvements for mining purposes upon said ground not in actual use, provided that, if the railroad company required any portion of the right of way so occupied or used by the mining company, upon notice the mining company was to remove any improvements or obstructions down to grade as established at the time of the agreement. On July 2, 1892, the Northern Pacific Railroad Company leased to the predecessors of the plaintiff herein its right of way on the east side of its main track as the same was then located upon certain premises, the portion leased extending from the Y connection, as shown upon a plat referred to in the lease, to a connection with the Montana Union Railroad, lying to the north of the said Y connection as marked upon such plat. The railroad company in the lease granted the plaintiff's predecessors the right to use its embankment, upon which its railroad had been constructed, to serve as a dam for the purpose of storing water upon the right of way so leased. The plats offered for examination by the court show that the tract of land involved, and upon which the plaintiff had the right to flood and store water, lies between the roadbed of the Northern Pacific Railway Company on the one side and the hill on the other, and is part of a large tract of land designated as "Mineral Application No. 685," which belongs to the appellant the Butte & Boston Consolidated Mining Company. It is conceded that since the original grants to it the plaintiff has used a portion of the ground within the limits of the right of way and along the embankment of the railroad company, has flooded the same, and stored water thereon. It is stated by counsel that the water so stored came from Silver Bow creek. About July 11, 1897, plaintiff, claiming certain rights to the use of some of the waters of a stream in Park canyon, a creek in the vicinity of the water already

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stored, dug a ditch across the southeasterly part of mineral application No. 685, and attempted to bury boxes therein to conduct such newly-acquired and additional waters from Park canyon over to the storage basin. The distance from the point of plaintiff's entry upon mineral application No. 685 to the water already stored was about 1,400 feet. In plain words, plaintiff the Montana Ore-Purchasing Company wanted more water for its concentrator, and was attempting to prepare to convey an increased supply across lands of the Butte & Boston Mining Company, when they were enjoined in this proceeding. Plaintiff had, with the railroad company's consent, increased the height of the railroad embankment referred to, which operated as a dam, some time prior to the attempt just mentioned, so that it had increased its storage capacity before it undertook to increase its water supply in the manner indicated.

By these several actions the question for decision now arises upon the provision of the agreement and lease, heretofore quoted, between defendants and plaintiff's predecessors in interest. It is argued by plaintiff that it is the owner by grant of an easement in the land of defendant, and that it has a right to such an occupancy and use of the land across which it proposed to lay its water boxes as will enable it to enjoy the easement. It is insisted that the grant of a right to flood and store water east of the Y of the north leg of the Northern Pacific Railroad is a grant sufficiently large to enable plaintiff to occupy the whole of mineral application No. 685 for flooding and storage purposes, if situate east of such north leg; and that a right to procure water, and to conduct the same onto said mineral application No. 685, was implied in the grant as a matter of law. It says that to deny its right to convey water to the premises is nothing less than a denial of its right to store water thereon. We are of a different opinion. The right to flood and store water which the plaintiff enjoys is an easement. As the owner of this estate,

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plaintiff has a right over the land of the defendant. The estate of the plaintiff is the dominant one; that of the defendant a servient one. Let us grant, for present purposes, that the enjoyment of the easement was not confined to any portion of the premises described in the deed, and that plaintiff could flood and store water upon the whole thereof, yet, conceding all these things to be true, it does not follow therefrom that a grant of a right to flood and store water even upon the whole tract described necessarily carried with it the further right to lay pipes across the land of the defendant, by means of which the water to be flooded and stored was to be conveyed, where the pipes or boxes were not necessary or in use at or about the time the easement was granted. Giving full force to the doctrine as laid down by Washb. Easem. page 42, that "the grant of a thing carries all things as included without which the thing granted cannot be enjoyed," still, as further held by that author, the principle is subject to limitations "by which the things granted are understood to be things incident and directly necessary to the thing granted." It is not claimed that any easement to convey water to the land existed as in use at the time of the grant except from certain sources other than the ones now sought to be utilized. In making the grant the defendants' predecessors in interest did not undertake to enlarge it so as to include a right to dig up the soil and lay pipes therein. All they did was to specify what the grant was,—to name the purposes and give its extent and direction. Therefore, unless the proposed use of the defendants' ground to lay pipes therein is necessary for the enjoyment of the flooding or storage of water for plaintiff's use, no construction of the grant can be adopted which authorizes such a use. The object of the grant, of course, was to provide a place to store water for plaintiff's mining uses. The means by which this object was to be attained at the date of the grant were by waters brought onto the ground from Silver Bow creek, or, it may be, other sources, but clearly in a different direction from the ditch or flumes proposed to be laid

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from Park canyon. It is evident that water is necessary to enable the storage basin to be used for the purposes intended, and it sufficiently appears that the right to conduct the waters of Silver Bow creek to the land was a use presumed to be within the purview of the parties. This is a reasonable construction, for without it the grant would have been of no benefit to the grantees all these years. But, inasmuch as the digging of a trench across defendant's land to conduct the water of Park canyon to the ground does not appear to be necessary, but may be a convenience only, the right to so dig is not granted. In *Lyman v. Arnold*, 5 Mason, 195, Fed. Cas. No. 18, 626, STORY, J., said: "There may be many conveniences which yet do not pass as incidents to a grant. When the parties make their contracts, it is their duty to provide for such conveniences. When the law is called upon to interpret their acts, it has nothing to do with such matters. It can only act upon necessary incidents or implications." In *Jennison v. Walker*, 11 Gray, 423, the defendant relaid pipes for the conveyance of certain water through the land of plaintiff, not in the line or direction in which certain logs were originally placed after a deed granting the easement was made, but in a different direction, occupying another portion of the land belonging to the plaintiff. It was held that defendant gained no such right under the grant of the easement, the court saying that there was no grant of a right to construct more than one passage for water, nor to change the direction of the one first constructed, at the pleasure of the grantee. In *McDonald v. Lindall*, 3 Rawle, 492, it was expressly laid down that the right of way from necessity over the land of another "is always of strict necessity, and this necessity must not be created by the parties claiming the right of way. It never exists when a man can get to his property through his own land. That a road through his neighbor's would be a better road, more convenient, or less expensive, is not to the purpose; that the passage through his own land is too steep or too narrow does not alter the case. It is only

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where there is no way through his own land that the right of way over the land of another can exist." So, in this case, doubtless, it would be a less expensive method of getting water into the storage basin of the plaintiff herein to run its pipe line across the land of defendants than to condemn the way selected or to find another; but it is by no means apparent that the necessity exists for the plaintiff to select a route which requires it to dig trenches through the defendants' land. Onthank v. Railroad Co., 71 N. Y. 194, was an action of trespass. It appeared that one Brown, whose farm adjoined the plaintiff's, executed to a railroad company a deed granting to it and its successors and assigns forever the right to enter upon his land, to build and maintain a reservoir for water, and to lay down and maintain an iron pipe or conductor to carry the water from said reservoir to the water tank at Portland station, and also a right to build and maintain ditches to conduct the water to the reservoir. The plaintiff, who knew of the contents of the deed of Brown, executed to the same railroad company a deed, granting it a right to enter upon his land for the purpose of laying down and keeping in repair an iron pipe to carry water to the water tank near the Portland station. The defendant succeeded to the rights of the grantee in those deeds. It appeared that there was a spring at the time of the granting of the deeds on Brown's land, which flowed over the land of plaintiff's. The water was collected, and a two-inch pipe was laid by the grantee from the reservoir across Brown's land to the Portland station. Eight years after this pipe was laid, the defendant improved the reservoir, and put down a four-inch pipe instead of the two-inch, thus diverting an increased quantity of water. The court decided that, after the grantee had once laid its pipe, and thus selected a place where it would exercise its easement thus granted in general terms, "what was before indefinite and general became fixed and certain, and the easement could not be exercised in any other place. This is confessedly so in reference to the rights of way granted in similar

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terms." It was further held that the language used in the grant showed that it was not intended that, after the grantee had laid down a pipe, it should have the right to enter upon the land, and lay down a larger pipe. "The right granted," said the court, "was to enter upon the land and lay down a pipe two feet below the surface, and to keep that pipe in repair; not to enter upon the land at any time, and dig up the soil, for the purpose of laying down a larger pipe." The reasoning of these cases confirms us in the belief that the acts of the parties and the use of the easement granted for flooding and storage purposes, when considered for the purpose of arriving at the intention of the parties to the deed in question, excluded from the easement granted a right to lay pipes to conduct water across the land of the defendant, except such as existed at and about the time of the execution of the grant itself. See, also, *Turnbull v. Rivers*, 3 McCord, 131. Upon this branch of the case we think the district court erred in refusing to dissolve the injunction.

2. We next pass to the contention of plaintiff that the court erred in refusing to dissolve the injunction whereby the defendants were prohibited from putting a flume through the railroad embankment at a point where such embankment was used as a dam to hold plaintiff's stored water.

Same—Use of Railroad Embankment as Reservoir Dam—Injunctions.

In presenting their side of this feature of the controversy, the appellants lay great stress upon the character of the rights leased by the railroad company to the plaintiff, whereby the said railroad company gave plaintiff a right to use its bank upon which the railroad is constructed to serve as a dam for the purpose of storing water. We are urged to hold that, the grant of defendants' predecessors to the railroad company being only "an easement for right of way on, over, and across" the ground in question, it followed that under this grant the railroad company had no power to grant the plaintiff herein the right to use its said embankment as a dam. It appeared on the hearing that the railroad company, under an agreement with plaintiff,

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and at plaintiff's expense, increased the height of its embankment, which constituted the dam or west side of the storage basin of plaintiff's, the object of this increase in height having been to enable plaintiff to raise the height of the dam lying east thereof so as to store more water. Of this the appellants also complain. But, in our opinion, the railroad company, under the grant to it, clearly had a right to maintain its roadbed and to raise or lower the height thereof as its necessary convenience demanded, subject always to the reserved rights of the deed. Furthermore, the plaintiff had a right by grant from defendants to flood and store water east of the embankment of the company, because such embankment is the one upon which the north leg of its Y rests. Now, if the appellants are not seeking to avail themselves of some right reserved to them in their grant to the railroad company (and they are not), and if the plaintiff is strictly in the enjoyment of merely the right granted to it to flood and store water east of the embankment (as it is), how can these appellants claim they are injured by the exercise of that right because plaintiff avails itself of an embankment constructed for a roadbed, when such construction was proper, and under their own authority or grant? Moreover, the railroad company is not a party to this suit, and, so long as plaintiff has not exceeded any rights granted to it by appellants, they cannot ask the court in this proceeding to determine the precise extent of the railroad company's rights. But we can rest our decision of this matter upon another point. It evidently satisfactorily appeared to the lower court by the testimony that appellants were not intending to use the box or sluices which they wished to put into the embankment for any beneficial purposes. It was in evidence that the place where appellants were trying to put the box in was below the point where plaintiff's water line might often come, and that to allow the box to remain would be a danger to the whole embankment. Under such a condition of facts there was certainly no abuse

Note

of discretion on the part of the court in refusing to dissolve the injunction in this respect.

It is therefore ordered that in case No. 1,175 the order of the district court refusing to restrain the Montana Ore-Purchasing Company from laying a pipe, or from constructing and maintaining a ditch or flume upon and over that parcel of the ground designated as "Mineral Application No. 685," be, and the same is hereby, reversed at the cost of respondent. Reversed.

And it is further ordered that the order of the court refusing to dissolve the injunction restraining the Boston & Montana Consolidated Copper & Silver Mining Company, and the Butte & Boston Consolidated Mining Company, Frank Klepetko, C. S. Batterman, and Robert White from interfering with, breaking, or destroying that certain embankment underneath and along the north branch or spur of the Northern Pacific Railroad Company westerly from mineral application No. 685, and from making any openings through said embankment for the purpose of placing a flume therein, be, and the same is hereby, affirmed, at the costs of appellants. Affirmed.

It is also ordered that the appeal in case No. 1,184 be dismissed. Dismissed.

PEMBERTON, C. J., and PIGOTT, J., concur.

NOTE.

Grant of Right of Way—Rights of Railroad Companies.—A railroad company, after having obtained the right of way for its road, is entitled to the exclusive possession of such way, and stands to adjoining proprietors (where no statute has changed the relation) in the common relation existing between proprietors of lands bordering on each other. *Williams v. New Albany & S. R. Co.*, 5 Ind. 111.

McNee v. Coburn Trolley-Track Co

MCNEE

v.

COBURN TROLLEY—TRACK CO.

(*Supreme Judicial Court of Massachusetts, Feb. 24, 1898.*)

Injury to Employee—Defective Elevator—Sufficiency of Notice—Question for Jury.—As a general rule, it is a question of fact for the jury to determine, whether or not a writing posted in an elevator is a sufficient warning of danger in using it.

Same.—And where such notice had been posted for a long time, and defendant knew that it had been habitually disregarded by its employees, whether or not it had been practically withdrawn was a question for the jury.

REPORT from Hampden county superior court.
Judgment for plaintiff.

A. L. Green, for plaintiff.

Henry A. King, for defendant.

ALLEN, J. The general condition of the elevator was such that a jury might find that the defendant would be negligent in continuing its use for carrying workmen up and down while engaged in their work, if this was done without warning them of the risk. It is true that the particular defect which caused the accident was not open to observation, or easy to discover.

Injury to Employee—Defective Elevator—Sufficiency of Notice—Question for Jury.

But there was evidence tending to show that it was caused by the use of the elevator while it was in a condition which rendered it unsuitable for use, and that the defendant was fairly put upon inquiry as to its safety, and that its duty in this respect was different from and greater than that of the workmen themselves. The question, then, remains whether the posting of the notices in the elevator showed such a performance by the defendant of its duty of warning or cautioning the workmen, or such contributory negligence or assump-

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tion of the risk on the part of the plaintiff, as to entitle the defendant to have the case withdrawn from the jury. While, upon the evidence reported, a verdict for the defendant would be more satisfactory, we are unable to hold that the defendant was entitled to such verdict as a matter of law. As a general rule, the sufficiency of such warning or caution is a question of fact for the jury. *Indermaur v. Dames*, L. R. 1 C. P. 274; *Id.*, L. R. 2 C. P. 311. It is true that the plaintiff was not at liberty to shut his eyes in order to avoid reading a plain notice of warning. If it be assumed that the plaintiff must be held chargeable with a knowledge of the contents of the notice, or at least that the defendant performed his duty of cautioning the workmen by posting the notices in the elevator, we think the plaintiff still had the right to go to the jury upon the question whether the notices remained in force at the time of the accident or had become a dead letter. There was

Same. evidence tending to show that the notices were put in the elevator a long time before the accident, by a former treasurer, whose connection with the company had then ceased; that they had become soiled, and somewhat indistinct and torn; and that all the defendant's workmen, including the general superintendent of the building, were in the regular habit of using the elevator to carry them up and down, and had been so for some months prior to the accident. There was room for a legitimate argument that the defendant could not have intended to keep such a rule in force forever, and to furnish an elevator for permanent use by the men at their own sole risk; and that the defendant expected the men to use it while they were engaged in its work, and that it was for the defendant's advantage that they should do so, from the saving of time thereby secured. It might be found that the plaintiff, even if he knew of the terms of the notice, might nevertheless assume that its force had ceased. If one who has posted a notice of entire prohibition permits it to be habitually disregarded,—as, for instance, a notice not to ride on the platform of a

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street-railway car, or in the baggage car of a train,—a practical invitation to violate it may be inferred from habitual usage which is known to him. Long-continued practice to the contrary may have the effect to supersede or show a waiver of the rule. *O'Donnell v. Railroad Co.*, 59 Pa. St. 239; *Railroad Co. v. Langdon* 92 Pa. St. 21; *Waterbury v. Railroad Co.*, 17 Fed. 671. The notice in the present case was not one of entire prohibition, but, in the opinion of a majority of the court, the plaintiff, upon the evidence, had a right to go to the jury upon the question whether it still remained in force; and, according to the terms of the report there must be judgment for the plaintiff.

BOARD OF EDUCATION

v.

KANAWHA & M. R. Co.

(*Supreme Court of Appeals of West Virginia, Nov. 24, 1897.*)

Eminent Domain—Taking School Property for Railroad Purposes—Measure of Damages.*—If a part of a public school house lot is taken by a railroad company, the measure of damages is the value of the land taken, together with the damages to the residue, less peculiar benefits thereto from the construction of the railroad.

Same.—The damages to the residue, less peculiar benefits, is the difference between the value of the property for school purposes before the construction of the road and its market value for any purpose after the construction, if its value for school purposes has been wholly destroyed; and, if not, then the difference between its values for school purposes before and after the damages suffered.

(Syllabus by the Court.)

ERROR by plaintiff to Kanawha county circuit court.
Affirmed.

Benj. Trapnell and *W. S. Laidley*, for plaintiff in error.

Couch, Flourney & Price, for defendant in error.

*See 4 Rap. & Mack's Dig., p. 574, *et seq.*

Board of Education *v.* Kanawha & M. R. Co

DENT, J. The board of education of Canin Creek district appeals from a judgment of the circuit court of Kanawha county, rendered on the 7th day of July, 1897, setting aside the verdict of a jury in favor of said board against the Kanawha & Michigan Railroad Company for the sum of \$800. After the verdict had been returned by the jury, not having interposed any defense, although in court and pleading, the attorney for the defendant company appeared, filed his affidavit, and moved the court to set aside the verdict, and grant the defendant a new trial, for two reasons: First, on the ground of surprise; second, because the verdict was contrary to the law and evidence. The affidavit filed is to the effect that defendant's attorney, resting under the belief that the defendant derived title to the land in controversy by general warranty deed from the heirs of William Dickinson, deceased, notified the attorneys of such heirs to defend the suit, and, taking it for granted that they would do so, paid no more attention to the suit until the verdict was returned. This is not a sufficient reason for setting aside the verdict. It was the duty of the company to be present in court, and defend its interest, and it had no right to shift the responsibility to the shoulders of others, unless certain it was right, and in that case there would be no justification for setting aside the verdict, as the company, having made deliberate choice of its remedy, should abide by it. The verdict of the jury had the effect to arouse the attorney to his responsibilities, and he immediately appeared, and moved to set it aside, as contrary to the law and the evidence. The facts, as gleaned from the testimony, so far as necessary to a determination hereof, are as follows: In 1875 the plaintiff purchased a half acre of ground of George W. Nugen at the price of \$45, worth now about \$100. About the year 1882 it erected a second school house thereon, worth about \$700. In the year 1892, the defendant, without legal permission so to do in any manner obtained, took possession of a large portion of the lot, and constructed a high embankment across the

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same for the bed of its road. It is shown that this took away and destroyed the children's playground, cut off communication with the river and spring on the bank thereof, and created a nuisance, both by reason of the noise occasioned by the running of the trains and the danger to the children by reason of its proximity to the school house, and the necessity for the children to cross and recross the tracks so often, and, through thoughtlessness, to play thereon. The board continued to use the school house for school purposes, and down to the time of trial had the regular annual school taught therein. Outside of a few general statements, the only evidence touching the damages involved was the testimony of W. H. Edwards, at the time of the trial and for 10 years previous thereto president of the board, who testified as follows in answer to questions propounded: "It has ruined it as a school lot. It is good for nothing for school purposes. It takes the playground from the children, which is a thing the children ought to have; and it exposes them to the peril of their lives when they go after water; and they cannot keep them off the railroad, and either way you cannot see a train coming 50 feet. * * * It is ruined for school property. As a school property, it is worth nothing. That is all I can say. The property is worth about \$1,000,—well, about \$850, lot and all. We could not replace that house under \$700, and it is all about \$900. We are not allowed to use it for anything but school purposes." The jury on this evidence, found a verdict for \$800, which was about \$50 more than it had cost the board. Counsel say that a large part of this was interest estimated from the time the damages first accrued. They forget that, notwithstanding their last witness testified that "as a school property it is worth nothing," they show that the board continued to occupy and use it for school purposes down even to the present time; that the school was continued to be taught therein, although the presence of the railroad and its trains caused annoyance to the teachers and children. Nor has the question of exemplary

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damages anything to do with this case. This was not the taking of private property for public use, but it was the taking of public property for another public use. This being public property, the public had the right, through the company, its creature, endowed with its franchises, though for private gain, to take by purchase or condemnation. The mere fact that the company took possession thereof with the tacit consent of the board would not make it liable for exemplary damages, but only for such compensatory damages as would make the ousted public use whole again. 6 Am. & Eng. Enc. Law, 581. Nor does the fact that it is already public property enhance the damage, for the board has the full authority of law to condemn any suitable property to take the place of that of which it is deprived.

**Eminent Domain—
Taking School
Property for Rail-
road Purposes—
Measure of Dam-
ages.**

The same rule then governs in such cases as in the taking of private property, and this is a just compensation for so much as is taken, and for damage to the residue, beyond peculiar benefits to be derived from the work to be constructed. The first thing is to ascertain the value of the land taken, which in this case could not exceed \$50.00, and next the damage to the residue, less peculiar benefits. The damage to the residue is, conceding such to be the case, the entire destruction of the property for school purposes. The peculiar benefits would be the rendering the property valuable for other purposes, such as making it marketable as a dwelling house, storeroom, or otherwise; and hence the necessity of ascertaining the true market value of the property for any purpose. The true rule, then, for the damages, is the difference between the value of the property for school purposes before it was damaged and the market value of the property for any purpose after it was damaged. 6 Am. & Eng. Enc. Law, 507; *Stewart v. Railroad Co.* 38 W. Va. 438, 18 S. E. 604. This last matter was wholly disregarded by the plaintiff in its evidence, to the misleading of the jury. A person who goes to his neighbor's granary in his absence, to recoup a tacit loan of corn, should not take

Simmons v. Worthington

more than would make him whole. The law does not permit it. The property in controversy may have a greater value for other purposes than it ever had for school purposes. It would not be just to make the company pay for the property, and permit the plaintiff to keep it, and sell it at its increased or market value, but such value should be taken into consideration. Before damage, it had no market value, for it was set apart for public uses, not marketable. Being destroyed for such uses, it has a market value for other uses. This the plaintiff could have ascertained, after it was abandoned for its purposes, by a sale thereof, which is authorized by Code, c. 45, § 33. Same.

If, however, the property is still to be used for school purposes, then the damage is the difference between its value for such purposes before and after the taking. Water could be supplied by a well, a high fence could be constructed so as to keep the children off the railroad, and adjoining land might be obtained for a playground. The evidence and law not justifying the verdict according to former decisions of this court, the circuit court committed no error in setting the same aside. The judgment is therefore affirmed.

SIMMONS *et al.*

v.

WORTHINGTON *et al.*

(*Supreme Judicial Court of Massachusetts, Jan. 8, 1898.*)

Sale of Franchises under Execution*—Charters.—A provision of a railroad company's charter prohibiting it from selling or assigning its charter, or the rights granted therein, is not applicable to a sale of such franchises under an execution issued in behalf of a judgment creditor.

Same.—So far as the franchises of a railroad corporation relate to receiving toll, they are subject to sale under execution under Pub. St. of Massachusetts, c. 105, section 31.

Constitutionality of Statute.—Such statute is not unconstitutional, such sales not involving the taking of private property for public use.

*See note at end of case.

Simmons v. Worthington

REPORT from Suffolk county supreme judicial court.
Dismissed.

*John F. Simmons and Walter B. Grant, for plain-
tiffs.*

*Richard M. Saltonstall and George M. Cushing,
for defendants.*

BARKER, J. The Plymouth county Railroad Com-
pany was chartered by St. 1892, c. 151, and was organ-
ized in April, 1892. No part of the railroad
Case Stated. has been built. The defendant Worthing-
ton is a judgment creditor of the corporation, and has
caused the other defendant, who is a deputy sheriff,
to levy an execution, issued on the judgment, upon the
franchise of the corporation so far as relates to receiv-
ing of toll, and he proposes to sell the same upon the
execution, under the provisions of Pub. St. c. 105, §
31 *et seq.* This bill was brought to enjoin the sale,
and the question for decision is whether an attachment
and sale of the franchise, in the manner proposed, is
authorized by law. In our opinion, it is so authorized.
By the first section of the charter the corporation is
given all the powers and privileges set forth in the
general railroad laws, except as afterwards provided
in the charter. One of these powers and privileges is
that of establishing tolls, set forth in Pub. St. c. 112,
§ 180. There is no provision of the charter which
interferes with this power or privilege. The tenth
section of the charter (St. 1892, c. 151, §
Sale of Franchises 10), providing that "the said company shall
under Execution— not sell or assign its charter or the rights
Charters. and privileges herein granted except as
hereinbefore set forth," is immaterial to the present
question, because the corporation is in no way an actor
in the proposed sale. That section merely prohibits
sales and assignments by the corporation itself, except
such as it may make with other railroad companies
under the authority given by the sixth section of the
charter. The corporation is one which, by force of

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its charter and the general railroad laws, is "authorized to receive toll," which is the language used in Pub. St. c. 105, § 31, providing for such sales as that proposed. It is contended that railroad corporations, although authorized by law to establish tolls, are not within the meaning of the provisions in question. These provisions seem to have their origin in St. 1810, c. 131, added to by St. 1824, c. 121, and St. 1826, c. 116. No railroad corporations were chartered here until the year 1825, when the Granite Railway Company was incorporated, with the right to demand and collect toll. Between that time and the adoption of the Revised Statutes many railroad charters were granted, and in each is found a provision authorizing the corporation to take toll. See St. 1829, c. 26, § 6; *Id.* c. 93, § 10; *Id.* c. 94, § 5; *Id.* c. 95, § 5; St. 1830, c. 4, § 5; St. 1831, c. 27, § 10; *Id.* c. 55, § 5; *Id.* c. 56, § 5; *Id.* c. 57, § 6; *Id.* c. 72, § 6; St. 1832, c. 49, § 5; *Id.* c. 80, § 5; *Id.* c. 97, §§ 5, 6; St. 1833, c. 109, §§ 4, 5; *Id.* c. 116, §§ 4, 5; *Id.* c. 118, §§ 4, 5; St. 1835, c. 95, § 8; *Id.* c. 111, § 4; *Id.* c. 131, §§ 4, 5. The general provision to the same effect was first enacted in Rev. St. c. 39, § 83, and was continued in Gen. St. c. 63, § 112, in St. 1870, c. 325, § 1, in St. 1874, c. 372, § 179, and is now found in Pub. St. c. 112, § 180. In adopting the Revised Statutes the legislature brought into the same title this provision, authorizing railroad corporations to receive toll, and those authorizing the attachment upon *mesne* process, and the sale upon execution or warrant of distress of the franchises of corporations authorized to receive toll, so far as those franchises relate to receiving toll. In none of these statutes are railroad corporations expressly mentioned, but in all of them they are included in the plain meaning of the language used, and we have no doubt that they were intended to be and are within the statute. In *Railroad Co. v. Hubbard*, 10 Allen, 459, note, such a sale was held to confer a good title upon the purchaser.

It is also contended that, if the statute is intended to

Note

apply to railroad corporations, it is unconstitutional, because it compels a corporation, whose franchise, so far as it relates to receiving toll, has been sold upon execution, to continue to discharge its duties as before the sale. But it is plain that the sale involves no taking of private property for public use. It is merely an application of the franchise of the corporation to the payment of its debt, and the constitutional provisions invoked have no application. An attachment and sale of the franchise in the manner proposed being authorized by law, and this being the only question in the case, the bill will be dismissed. Bill dismissed, with costs.

NOTE.

Corporate Franchises—Execution.—It is a rule of the common law that franchises of a corporation cannot be seized and sold on execution, the reason assigned being that franchises are intangible and incapable of delivery by the sheriff to a purchaser. *Stewart v. Jones*, 40 Missouri, 140 (1867); *Gue v. Tide Water Canal Co.*, 24 How. (U. S.) 257 (1860); *State v. Rives*, 5 Ired. Law (N. Car.) 305 (1844); *Arthur v. Commercial & Railroad Bank*, 9 Sm. & Mar. (Miss.), 431 (1848); *Randolph v. Larned*, 27 N. J. Eq. 557 (1876); *Richardson v. Sibley*, 11 Allen (Mass.), 71 (1865); *Susquehanna Canal Co. v. Bonham*, 9 W. & S. (Pa.) 27 (1845); *Palestine v. Barnes*, 50 Tex., 538 (1878); *Baxter v. Turnpike Co.*, 10 Lea (Tenn), 488; *Louisiana v. Morgan*, 28 La. Ann. 482 (1876); *New Orleans, etc., R. Co. v. Delamore*, 34 La. Ann. 1225. Compare *Louisville Water Co. v. Hamilton*, 81 Ky. 517. See also *Mahoney v. Spring Val. Waterworks*, 52 Cal. 163 (1877); *Freeman on Executions*, § 179; *Taylor on Private Corporations*, § 671; *Morawetz on Private Corporations*, § 924, note 2.

Neither the franchise and privileges of a railroad company, nor any lands, easements, or things essential to the existence of the corporation, or necessary to the enjoyment of its franchise, can be sold on execution or order of court to satisfy a judgment at law against it. *Aliter* as to locomotives, cars, and other personal property. *Louisville, N. A. & C. R. Co. v. Boney*, 39 Am. & Eng. R. Cas. 168, 117 Ind. 501, 20 N. E. Rep. 432, 3 L. R. A. 435.

The franchise of a corporation cannot be levied on for a debt, or pass by bankruptcy sale, in the absence of power given either by the charter of the corporation or by the general law. *New Orleans, S. F. & L. R. Co. v. Delamore*, 34 La. Ann. 1225.

The franchise in a railroad erected by an incorporated railroad and banking company cannot be sold or assigned without the consent of the power which granted it; it is a mere easement, not the subject of sale. If the road be sold or assigned, the franchise does

Mitchell v. Nashville, C. & St. L. Ry. Co

not pass with it, nor is the corporation thereby dissolved, though it might be a ground of forfeiture if insisted on by the state. *Arthur v. Commercial & R. Bank*, 17 Miss. 394.

The Pa. Act of April 7, 1870, authorizing executions against corporations, supplies §§ 72, 73 of the Act of June 16, 1836, authorizing sequestration. The franchises and property of a corporation may be seized and sold out under a *fi. fa.* *Philadelphia & B. C. R. Co.'s Appeal*, 70 Pa. St. 355.

By the laws of Texas in 1861 (Pasch. Dig. art. 4912), a railroad and its franchises and chartered rights were subject to sale as an entire thing, under execution issued on judgments against the railroad company which owned it. *Stevenson v. Texas & P. R. Co.*, 12 Am. & Eng. R. Cas. 393, 105 U. S. 703.

The road and franchises of a railroad company are liable for the payment of judgments recovered against the company. *Winchester & S. R. Co. v. Colfelt*, 27 Gratt. (Va.) 777, 17 Am. Ry. Rep. 121.

MITCHELL

v.

NASHVILLE, C. & ST. L. RY. CO.

(*Supreme Court of Tennessee, Feb. 11, 1898.*)

Frightening Horses*—Blowing Whistle Beneath Bridge—Exceptions.—In deciding whether or not a demurrer to the sufficiency of plaintiff's evidence, should be sustained, the insufficiency of plaintiff's bill of exceptions is immaterial, where all the evidence is incorporated in the demurrer.

Same—Prima Facie Negligence—Burden of Proof.—Blowing a locomotive whistle under a bridge constantly used by the public is *prima facie* negligence; and where plaintiff's evidence shows damage resulting from such act on the part of defendant, the burden is on defendant to show some special necessity for the signal.

Same—Contributory Negligence—Damages.—In such action, it was a question for the jury whether or not contributory negligence on the part of plaintiff should be considered by them in assessing damages.

APPEAL by plaintiff from Cheatham county circuit court. *Reversed.*

J. L. Watts, for appellant.

Jacob Leech and *J. B. De Bow*, for appellee.

*See exhaustive note on Frightening Horses, 5 Am. & Eng. R. Cas., N. S., page 291.

Mitchell v. Nashville, C. & St. L. Ry. Co

SNODGRASS, C. J. The plaintiff in error was in a wagon driving a pair of mules over a bridge on the Charlotte pike near Nashville. This pike was a public thoroughfare much traveled, and vehicles of all kinds were constantly passing over the bridge. While plaintiff was so passing, an engine of the defendant, Nashville, Chattanooga & St. Louis Railway Company, passed under it; and while under it, or just as it was passing out from beneath, its whistle was loudly blown several times. This frightened the mules, which ran away, and plaintiff in error was thrown out of the wagon, and badly injured. Through a next friend (plaintiff being a minor) he brought this suit. Issue was joined, trial had, and, after all plaintiff's evidence was in, defendant demurred to it as insufficient in law to authorize recovery. In addition to what we have stated as facts of the case which were proven, plaintiff testified that he did not know the cause of the blowing, and made no effort to prove whether there was or not a legal or proper cause or excuse therefor. Upon the demurrer, which admitted all the evidence, and all legitimate inferences arising thereon, the question was whether negligence could be inferred from such blowing of the whistle under a public bridge on a thickly traveled thoroughfare while plaintiff in error was driving over it. The court held it could not, and dismissed the suit. Plaintiff took a bill of exceptions, which is objected to in this court as insufficient. This is immaterial. The demurrer incorporates the evidence, and a bill of exceptions was not necessary. 2 Elliott, Gen. Prac. § 855. On the merits, defendant's counsel, in connection with an ingenious argument of much plausibility, cites as authority for the action of the court the case of *Railway Co. v. Gaines*, 104 Ind. 526, 4 N. E. 34, and 5 N. E. 746, and 54 Am. Rep. 334, in which it was held that it was not necessarily negligent in a railway company to sound a locomotive whistle at a point where the railroad crosses a highway by a bridge overhead, although the crossing is known to be

Case Stated.

Frightening
Horses—Blowing
Whistle Beneath
Bridge—Excep-
tions.

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one of extraordinary danger, and the sounding of the whistle causes a horse to run away. We have stated the principle of this case from its own syllabus as given in 54 Am. Rep. 334. It may admit of question if it is not too strong for a proper analysis of the case, which is a somewhat complicated one, and in which there were certain findings of fact, made by the court below, and certain omissions in finding, to which reference was made, and amid which findings and omissions the court with difficulty labored to a conclusion satisfactory to itself. But, assuming it to have squarely decided the question that such a blowing of an overhead engine would not be negligence *per se*, or such an act as that a jury or judge authorized to deduct legitimate inferences might not, in the absence of other proof, hold to be negligence, then such conclusion is not satisfactory to us, even upon its own facts. There, however, it will be remembered, the noise and smoke involved in the passage and blowing of an engine were above the animals, which might or might not be thereby frightened. Bad as these are, they are not, in the very nature of things, so terrifying as when puffing and blasting underneath the animal on a bridge above, where sound and sight and smell may all be combined to drive him to the verge of frenzy by terror. In such a case the supreme court of Pennsylvania held such blowing negligence *per se*. That court characterized it as an act of gross negligence. *Railroad Co. v. Barnett*, 59 Pa. St. 259-265. It was, of course, not decided that any blowing of a locomotive whistle would be negligence, or that every case of injury resulting therefrom would be made out by proving such blowing without more, and this the same court aptly illustrated in a late case. *Railroad Co. v. Stinger*, 78 Pa. St. 219. But it was distinctly held that a blowing under a bridge constantly used by the traveling public is *prima facie* negligence, and in that we cordially concur. See, also, Elliott, R. R. § 1264, reference to note 3, and cases cited; *Railroad Co. v. Starnes*, 9 Heisk. 52. Ordinarily, the use of a whistle is of

Same—Prima
Facie Negligence—
Burden of Proof.

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machinery and appliances necessary for many practical purposes; and where used under ordinary circumstances no inference of negligence could be drawn; but it is obvious that a blowing under a bridge is, in the absence of some special necessity therefor, an unnatural and reckless act, liable to cause great damage, and the circumstances and surroundings call, therefore, for proof of its necessity, when the act occasions the damage to be anticipated. The proof of such a blowing under such circumstances is sufficient to authorize the presumption of negligence. The onus is shifted to explain and justify or excuse it upon him who does it. This burden may be successfully carried, but it cannot be avoided by demurrer to plaintiff's evidence establishing the act. It results that judgment sustaining the demurrer must be overruled, and judgment rendered here against demurrant. The case will be remanded for a jury to assess damages.

It is insisted here, plaintiff could not recover, because he was driving one run-away mule. We find no such negligence in plaintiff's conduct as precludes a recovery. If he was guilty of any negligence to reduce the amount he might otherwise be entitled to, it is matter for the jury, which shall assess the correct amount to be given under the facts in evidence as demurred to. The defendant in error will pay the costs of the appeal.

Name—Contributory Negligence—Damages.

LOUISVILLE & N. R. Co. *et al.*

v.

BEHLMER.

(*Supreme Court of the United States, March 28, 1898.*)

Appeal from Decree Enforcing Order of Interstate Commerce Commission—Supersedeas.—An appeal by either party to the supreme court of the United States from a decree of a circuit court of appeals directing that an order of the interstate commerce commission be enforced operates as a supersedeas.

Louisville & N. R. Co. *v.* Behlmer

APPEAL by petitioner from the United States Circuit Court of Appeals for the Fourth Circuit.

Claudian B. Northrop, for the motion.

Ed. Baxter and *Jas. W. Barnwell*, opposed.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

Henry W. Behlmer filed a petition before the interstate commerce commission, which resulted in an order requiring the Louisville & Nashville Railroad Company and other companies to abstain from charging, demanding, collecting, or receiving any greater compensation in the aggregate for transportation on hay or other commodities carried by them, under circumstances and conditions similar to those appearing in the case, from Memphis, Tenn., to Summerville, S. C., to that contemporaneously charged and received for the transportation of hay and other commodities from Memphis to Charleston, S. C. The companies having failed to comply with that order, Behlmer filed his petition in the circuit court of the United States for the district of South Carolina, setting out the action before the commission, and the failure of the companies to comply with the order, and prayed for a writ of injunction or other proper process restraining the companies from continuing in their violation and disobedience to said order.

On final hearing the circuit court entered a decree dismissing the bill. 71 Fed. 835. Behlmer appealed to the circuit court of appeals for the Fourth circuit, and that court reversed the decree of the circuit court, and directed that the order of the interstate commerce commission be enforced. 42 U. S. App. 581, 83 Fed. 898.

An appeal was then allowed and perfected to this court, which operated as a supersedeas, and Behlmer now moves the court to declare the appeal not to have that effect, or to vacate the supersedeas resulting from the allowance of the appeal and the approval of the bond tendered.

Louisville & N. R. Co. *v.* Behlmer

The sixteenth section of the act to regulate commerce (24 Stat. 379, c. 104), as amended by the act of March 2, 1889 (25 Stat. 855, c. 382), under which resort to the circuit courts could be had for the enforcement of lawful orders or requirements of the interstate commerce commission, provided that: "When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the supreme court of the United States, under the same regulations now provided by law in respect of security for such appeals; but such appeals shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon."

At the date of the passage of these acts the rapid growth of the country, and the steady increase of its litigation, had so congested the docket of this court that years frequently elapsed before appeals and writs of error could be heard. When, then, the interstate commerce commission was created, and provision made for the enforcement of its orders by the circuit courts, while appeals were allowed from the decrees of those courts to this court, it was the legislative will that such appeals should not suspend the operation of the decrees appealed from. It is quite true that if the circuit court reversed the order of the commission, and dismissed the petition, the question of superseding such a decree might not be material; but, as the section provided that either party might appeal, the inhibition on the effect of the appeal applied alike to either.

The primary object of the judiciary act of March 3, 1891, was to relieve this court of the overburden of cases which impeded the prompt administration of justice, *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 118. Accordingly all cases in which the judgments and decrees of the circuit courts of appeals were made final by the act can only be brought to this court on *certiorari*, although in other cases, of which this is one, appeal or error will lie. The act also provided that when a case reaches this court through the circuit court of appeals, by appeal, writ of error, or *certiorari*, the cause shall

Louisville & N. R. Co. 7. Behlmer

be remanded to the proper district or circuit court for further proceedings in pursuance of the determination of this court, exactly as if the case came here directly from the district or circuit court.

Assuming that section 16 of the interstate commerce act remained unrepealed, it was nevertheless so far affected as that the appeal from the trial court had to be prosecuted to the circuit court of appeals, instead of to this court. *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 149 U. S. 264, 13 Sup. Ct. 837.

But such appeal would not operate to supersede the decree of the trial court, nor would such decree be superseded if the case were brought to this court from the circuit court of appeals, even though the judgment of the latter court were superseded. In this case the petition was dismissed by the circuit court. The court of appeals reversed that decree, but it still remained in force, because the judgment of the circuit court of appeals had been superseded. If the circuit court had decreed the enforcement of the order of the commission, and the circuit court of appeals had affirmed that order, and then the case had been brought here, the result would have been the same.

This application of the plain words of the statute gives the same effect to the appeal to this court from the intermediate court as if the appeal had been taken directly to this court from the circuit court.

Section 11 of the act of March 3, 1891, provided, among other things, as follows: "And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the method, and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals, and writs of error, and any judge of the circuit court of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the

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conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively."

And it is argued that the words, "all provisions for bonds or other securities," which were in force at the time of the adoption of the act of 1891, include, as applicable to appeals from the circuit courts of appeals the provision of section 16 of the interstate commerce act, that the appeal therein referred to shall not operate to stay or supersede. We cannot accede to that view, for the appeal treated of in section 16 is an appeal from the trial court, and does not refer to an appeal from the circuit courts of appeals. "Either party to such proceeding before said court may appeal," is the language; and, as "said court" confessedly referred to the circuit court, the only question would be whether the scope of the provision had been enlarged by the act of 1891, in the matter under consideration, which we do not think it had.

When cases are brought here from the circuit courts of appeals, we are, of course, called on to review the judgments of those courts, in revision of the judgments of the courts below; but our mandate goes to the court of first instance, and is there carried into effect, though the court of appeals may have sent its own mandate down before the case was brought to this court by appeals, writ of error, or *certiorari*. *The Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510.

The rule prescribed by the statute has necessarily not been changed by the omission to strictly observe it in the entry of judgment in some cases.

Motion denied.

Baltimore Trust & Guarantee Co. *v.* Hofstetter

BALTIMORE TRUST & GUARANTEE CO. *et. al.*

v.

HOFSTETTER.

(Circuit Court of Appeals, Sixth Circuit, Feb. 8, 1898.)

Insolvency—Foreclosure Sale—Assignee of Purchaser as Party to Proceedings.—The purchaser at a foreclosure sale makes itself thereby a party to the proceedings, and is entitled to be heard upon any question affecting its bid, but cannot question the original decree of foreclosure, nor any decree under which it has acquired its rights and title, and the assignee of the purchaser admitted as party has the same, but no more, right to be heard as the purchaser.

Same.—And where the purchaser at a sale under a decree of a circuit court enforcing the foreclosure of a mortgage takes the property subject to such future decrees with reference to the payment of any further or other portion of its bid into court as shall be deemed necessary to discharge any claims found to be entitled to priority over the bonds owned by such purchaser, the assignee of such purchaser cannot set up as a defense to such future decrees a title acquired subsequent to such foreclosure sale by his purchase of the road at a foreclosure sale under a decree of a chancery court enforcing a judgment lien, the additional title being no answer to the liability assumed as assignee of the purchaser at the preceding sale.

Same—Claims for Personal Injuries—When Liens.*—Under the law of Tennessee a claim against a railroad company for personal injuries is not a lien upon the corporate property; and the purchaser of a railroad sold under judicial proceedings, or by bargain and sale, would take the property free from liability on account of such claims, unless, by contract or some legal proceedings, they had become liens.

APPEAL from the Circuit Court of the United States for the Middle District of Tennessee.

This is an appeal from a decree upon an intervening petition in a railroad-foreclosure case, giving a preference to an unsecured debt, out of the proceeds of a mortgage foreclosure sale, to John Hofstetter, a judgment creditor of the Overland Railroad Company. The mortgages foreclosed were one executed February 13, 1892, by the Overland Railroad Company, a Tennessee street-

*See note at end of case.

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railway company, to the Baltimore Trust & Guarantee Company, as trustee, to secure an issue of bonds aggregating \$100,000, and another, to same trustee, to secure the same debt, made by the Nashville Traction Company, a Tennessee corporation, which had succeeded to the rights and property of the Overland Railroad Company, subject to the mortgage aforesaid. This second or additional mortgage was chiefly intended to be a conveyance of additional equipment added by the successor company, and conveyed in consideration of certain indulgence extended by the mortgagee, not necessary to be stated. Default in the payment of interest having accrued, and the maturity of the principal thereby precipitated, a foreclosure bill was filed in the circuit court against the Overland Railroad Company and its successor, the traction company. A receiver was appointed September 18, 1895, who took possession and operated the said railroad pending foreclosure. February 4, 1896, a foreclosure decree was pronounced settling the debt due on account of the mortgage by the Overland Railroad Company at \$100,000 principal and \$24,000 interest, and directing a sale of the franchises and property of both corporations for cash. It was provided, among other things, that, if the complainants (meaning thereby the mortgagee, or the beneficiaries under the mortgage) should buy the property, they should pay into court only \$5,000, and that the remainder of their bid might be credited *pro rata* upon each bond and each coupon, with this proviso: "But the said complainant, in addition to the said sum of \$5,000, shall take and hold the property subject to such future decrees with reference to the payment of any further or other sum of its said bid into court as shall be by the court deemed necessary to discharge the costs and expenses of this litigation, and to pay off and discharge any claims which this court may determine are entitled to priority over the bonds owned by the said complainant." The same decree further directed that all persons claiming to be creditors of either of the defendant corporations should file their claims with-

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in six months, by petition, and without further order of the court, and that all such petitions should "stand referred to the special master appointed in this cause, who shall, after giving proper notice to counsel of record, take and hear any proof that may be brought before him, reduce the same to writing, and report to this court the amounts, if anything, due upon each and every of such claims, and whether or not the same is entitled to any lien, preference, or priority." Under this order the appellee, John Hofstetter, filed an intervening petition, in which he claimed to be a creditor by judgment for the sum of \$3,500 rendered in a circuit court of the state October 29, 1895, against the Overland Railroad Company, and that his judgment was for damages for a personal injury sustained December, 1892, through the negligence of said railroad company when operating said railroad. He prayed that this judgment might be paid out of the proceeds of the sale of the said railroad, in preference to the mortgage debts of said company. The mortgaged property was purchased at the foreclosure sale for \$100,000, by a committee representing all of the bondholders and the sale confirmed to them. They paid in \$5,000, the remainder of their bid being credited on the mortgage debt, and were placed in possession,—subject, however, to the provision above set out, in respect to paying in any further part of their said bid in case same was needed to pay claims entitled to a preference over the mortgaged debt. Before the master had reported upon the claim of Hofstetter, the Nashville & Suburban Railway Company filed a petition praying leave to be admitted as a party. A stipulation was thereupon signed by counsel representing intervening creditors, agreeing that said company might become a defendant to the original bill, and to all of the petitions filed, and might "make defense thereto." This was signed by the counsel for Hofstetter. The court thereupon permitted said company to become a party, and to file an answer to Hofstetter's intervening petition. In its answer it alleged that the purchasers at the foreclosure sale had sold and

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conveyed to it "their right, title, and interest in all of said property and franchises," and that it was then "in possession of the same," and was then "running and operating said road." The defense presented by this answer to the relief sought by Hofstetter was that, after succeeding to all the rights and title acquired by the purchasers under the foreclosure decree of the circuit court, it had acquired another and superior title to the same property, under a judicial sale made by the chancery court of Davidson county, Tenn., in the case of Inez Colishaw against the Overland Railroad Company, wherein a judgment lien had been enforced by a sale of said Overland Railroad Company, in favor of said Inez Colishaw, superior in lien to that of the mortgage enforced in the circuit court, and to any right of Hofstetter against the same property. The master reported that the claim of Hofstetter was entitled to priority of payment out of the proceeds of sale. To this report only the Nashville & Suburban Railway Company filed exceptions. All exceptions were overruled, and "the purchasers" ordered to pay into court an additional portion of their bid sufficient in amount to pay off this and other claims entitled to be paid in preference to the mortgagees. From this decree, the Baltimore Trust & Guarantee Company, the Suburban Railway Company, and H. M. Doak, receiver, have appealed, and only the Nashville & Suburban Railway Company has assigned error. The errors thus assigned are as follows: "(1) It was error to decree that John Hofstetter had, by virtue of his judgment, more than an enlargement and extension of the general lien given a judgment creditor by virtue of sections 3694-3697, Mill. & V. Code Tenn., in this: that the mortgage from the Overland Railroad Company to the Baltimore Trust & Guarantee Company should not be an obstacle in the way of its enforcement by the legal methods given by the statute. (2) It was error to decree that after the sale of the entire property of the Overland Railroad Company, under the decree of the chancery court, at Nashville, Tenn., in the case

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of Inez Colishaw against the Overland Railway Company, there was any property, legal or equitable, for the lien of John Hofstetter to operate upon, and the said lien was therefore extinguished. (3) It was error to decree that John Hofstetter, a stranger, and not an employee of the Overland Railway Company at the time he is alleged to have sustained his injuries upon which his judgment is founded, is entitled to the prior lien and right conferred by the Tennessee act of 1877, c. 72, Mill. & V. Code, § 1271. (4) It was error for the court to decree in favor of allowing the claim of John Hofstetter as a prior lien on the property of the railroad company, when there was no proof to sustain the same. (5) It was error for the court to have overruled the exceptions to the master commissioner's report."

Baxter Smith, for appellants.

Jordan Stokes, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The right of the Nashville & Suburban Railway Company to appeal and assign error has been challenged. It was not a party to the original record. The purchasers at the foreclosure sale were Messrs. Smith, Fisher, and Middleton, who were acting in behalf of all the bondholders. The sale was confirmed to them as purchasers. They subsequently transferred all their rights and interests to the Nashville & Suburban Railway Company. The purchaser at a foreclosure sale makes himself thereby a party to the proceeding, with the right to be heard on all questions thereafter arising, which shall affect his bid, which are not foreclosed by the terms of the decrees under which he bought. *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950 ; *Davis v. Trust Co.*, 152 U. S. 590,

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14 Sup. Ct. 693. It is true that the Suburban Railway Company was not the record purchaser; but it is the assignee of the purchaser, and holds the property subject to all the conditions under which the purchaser held it. This alone would not make it a party, or give it any right to be heard upon questions arising affecting the purchaser's liability under his bid. But when it came forward and set up its status as the assignee of the right and title of the purchaser, and was admitted as a party, and allowed to appear and defend against Hofstetter's claim, it became a party, as a substitute for the record purchaser, and has the same right to be heard that the purchaser would have had. The decree of sale permitted the mortgagees, in the event they became the purchasers of the property, to credit upon their bonds the greater part of their bid. But this was upon the distinct condition that they "should take and hold the property subject to such future decrees with reference to the payments of any further or other sum of their said bid into court as shall be by the court deemed necessary to discharge the costs and expenses of this litigation, and to pay off and discharge any claims which this court may determine are entitled to priority over the bonds owned by complainants." The Suburban Railway Company, as assignee of the purchasing committee of bondholders, has no higher or better title or right than the purchaser had, and holds the said railroad subject to resale for noncompliance with this condition of the decree of sale. Admitted as a substitute, it may be heard upon any question affecting the purchaser's bid, but it cannot question the original decree of foreclosure, nor any decree under which it has acquired its rights and title. *Swann v. Wright*, 110 U. S. 510, 4 Sup. Ct. 235; *Kneeland v. Loan Co.*, 136 U. S. 89-94, 10 Sup. Ct. 950.

Insolvency—Fore-
closure Sale—
Assignee of Pur-
chaser as Party
to Proceedings.

We come now to the defenses presented to the decree directing payment of Hofstetter's claim out of the proceeds of the foreclosure sale. In considering these,

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we shall treat the appellant the Nashville & Suburban Railway company as standing precisely in the shoes of the bondholders' committee who bought at the foreclosure sale, and who have assigned their interest and title to it. On no other theory is it entitled to be heard at all in contesting Hofstetter's decree.

The first of these defenses is that the Suburban Railway Company has, since becoming the assignee of the title acquired under the foreclosure sale under the decree of the circuit court, acquired a new and independent title, under the decree of a state chancery court enforcing a judgment lien in favor of Inez Colishaw, and against the Overland Railroad Company, which lien antedated the lien of the mortgages enforced in the circuit court. The purchasers at the foreclosure sale bid the property in at \$100,000. They have paid in but \$5,000 of this amount. They may be required to pay in all or any part of the remaining \$95,000, if needed to pay off intervening claimants entitled to priority. Neither the purchaser nor his assignee can attack that decree: If, after sale and confirmation, and before the purchase money had been paid in, it had been discovered that the title obtained by the purchaser was defective, or was subject to some lien not before discovered, the court might, on a proper proceeding, and under some circumstances, have relieved the purchaser from his obligation to take the property, and ordered a resale, or made an abatement in the purchase price. Preliminary to any relief, the purchaser in such case would be obliged to offer to surrender the property for resale, and to abide by such terms as the court might impose, and to show that he was ignorant of the defect in title, or the adverse lien, and had been innocently misled. The general rule at all judicial sales is *caveat emptor*, and to take a mortgage foreclosure sale out of that rule would require a strong showing. Here the assignee of the purchaser made no effort to have the sale set aside, and none to have the Colishaw lien paid out of the proceeds of sale, though it is clear that, if Coli-

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shaw's judgment lien was superior to the lien of the mortgages foreclosed, the claim would have been paid off, upon proper application. But in this instance the creditors holding the mortgage and the purchaser at the foreclosure sale are identical in interest. The payment of Inez Colishaw out of the proceeds of sale would have been a payment at the expense of the purchasers. In this dilemma, the purchaser makes no effort to have this prior lien paid out of the proceeds of the mortgage sale, but elects to buy at the Colishaw sale, and then use that title as a defense against the payment into the circuit court of any further purchase money. Such a course would be grossly inequitable. The new or additional title the purchaser has thus acquired is no answer to his liability for purchase money. Nor is it of any avail to say that the Colishaw claim is superior in rank to the claim of Hofstetter. The decree of sale provided that the purchase money should be paid into court to the extent necessary to pay off claims entitled to priority over the mortgages foreclosed. If Hofstetter's claim is one of that description, it is entitled to payment, and the purchaser must pay in enough of his bid to satisfy that and all other claims which the circuit court shall determine are entitled to such priority. That condition in the decree of sale is one which

Same—Claims for
Personal Injuries—
When Liens.

the purchaser cannot question, and for a like reason no assignee of the purchaser can be heard to contest its force and validity.

The only question open to contest is so much of the decree as finds that the Hofstetter judgment is entitled to priority of payment out of the proceeds of sale. Hofstetter's judgment was rendered long after the execution of the two mortgages enforced in this case. But it was a judgment for personal injuries sustained by him through the negligence of the Overland Railroad Company. Priority in the payment of his judgment is claimed under the provisions of the third section of chapter 72 of the Tennessee Acts of 1877, carried into the revision of the Tennessee Code by

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Milliken & Vertrees as section 1271. That section is in these words :

“No railroad company shall have power to give or create any mortgage, or other kind of lien, on its railway property in this state, which shall be valid and binding against judgments and decrees and executions therefrom, for timbers furnished and work and labor done on, or for damages done to persons and property in the operation of its railroad in this state.”

By the act of March 26, 1887, all of the provisions of chapter 72 of the act of 1877, were extended to street-railway companies. The court below held that the effect of this provision of the Tennessee statute law was to postpone the Mortgages made by the Overland Railroad Company, and that the proceeds arising under the mortgage foreclosure sale were first liable to Hofstetter. The first objection made to this decree is that the Overland Railroad Company never availed itself of the power of consolidating with another company conferred by the act of 1877, and therefore the provision limiting its power to mortgage its property found in the third section of that act has no application to it. This act was construed by the Tennessee supreme court in *Frazier v. Railway Co.*, 88 Tenn. 161, 12 S. W. 537, as a limitation upon the power of all railroad companies to make mortgages, not having that power under special and irrepealable charters. Touching the scope of this third section, the supreme court of Tennessee in that case said:

“The object of the act is to regulate and define the terms upon which the state was willing to confer upon railroad corporations the power to consolidate, and to define the powers of such consolidated companies. We have already seen that a railway corporation may not, without express authority, abdicate its functions and duties, either by a sale or lease or mortgage. *A fortiori* it may not lose its own identity by suffering consolidation with another. It would therefore seem to need no support of argument that when the state, by legislation,

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undertook to confer upon all railroad corporations the power to absorb another, or to suffer an absorption by consolidation, it might well couple the grant of so extraordinary power with the condition or proviso that the corporations so empowered to consolidate should not have power, before or after such consolidation, to make any mortgage or create any lien which should affect the class of creditors to which complainants belong."

This construction by the highest court of Tennessee is one which we should accept and apply in respect to all Tennessee railroad companies not having, under special charters, the power of mortgaging their property. This provision operates only as a limitation upon the power of railway companies, commercial and street, to mortgage their property. Mortgages are not to have effect as against claims of the class mentioned, but no statutory lien in favor of such claims is thereby created. It follows, therefore, that a purchaser of the property of such a company, sold under judicial proceeding, or by bargain and sale, would take the property free from liability to creditors of the class mentioned in the statute, unless, by contract or some legal proceeding, they had become liens. This was the construction placed upon this statute by this court in *Railroad Co. v. Evans*, 31 U. S. App. 432-447, 14 C. C. A. 124, and 66 Fed. 818, where we said:

"The Tennessee supreme court has construed this act as operating as a limitation upon the power of railroad companies to give a mortgage or create a lien upon their property situated in the state, which should be valid as against claims of the character mentioned in the act. *Frazier v. Railway Co.*, 88 Tenn. 138, 12 S. W. 537. Such claims do not constitute liens by virtue of the act. The act has no other effect than to postpone mortgages and other liens created by act of the railroad company to claims of the character mentioned. A *bona fide* sale would not be a mortgage or lien, within the terms of the act, and the title of such purchaser would be unaffected by the act. If the Savannah & Western

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Railroad Company is a *bona fide* purchaser, it may set up the deed under which it holds as an answer to a claim, though clearly within a preferential class defined by the statute."

But this record shows that long prior to this foreclosure proceeding the property and franchises of the Overland Railroad Company had been sold under a creditors' bill filed in a chancery court of Davidson county, Tenn., subject only to the mortgage then existing in favor of the Baltimore Trust & Guarantee Company, and acquired through that judicial sale by the Nashville Traction Company. This was a wholly new and independent corporation, and the title it acquired by the sale under the decree of the state chancery court was a good equitable title, subject only to the mortgage aforesaid, and to the judgment lien in favor of Inez Colishaw; neither the Baltimore Trust & Guarantee Company nor Inez Colishaw being parties to that bill, so far as this record shows. Unless, therefore, Hofstetter's judgment was in some way a lien, the title of the traction company to the property and franchises of the Overland Railroad Company was perfect, as against any and all claims in whose favor the act of 1877 postponed mortgages. In October, 1894, nearly a year before the date of Hofstetter's judgment, this successor corporation assumed the Overland mortgage, and made a second or additional mortgage to the Baltimore Trust & Guarantee Company; conveying every interest it had thus acquired, as well as all additions and improvements it, as owner, had placed upon the original property. This successor company had been in possession, as owner, for some time prior to this mortgage, and had for more than a year been operating the said railroad, when Hofstetter recovered his judgment. Upon this state of facts, it is most apparent that the Overland Railroad Company, by the sale of all its property and franchises to a purchaser at judicial sale, had lost even its equity of redemption under its mortgage, and had no property whatever which could be reached by any creditor at large. The traction com-

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pany had acquired its property and franchises subject alone to the lien of the mortgage in favor of the Baltimore Trust & Guarantee Company. Under this state of facts, the property sold under the decree of sale of the court below was the property of the traction company; the sale being for the satisfaction of the Overland Railroad Company's mortgage, as well as of the second or additional mortgage made to secure the same debt. The proceeds of sale were the proceeds arising from the sale of the traction company's railroad, and were applicable to the satisfaction of the mortgage made by the Overland Railroad Company only because that incumbrance had not been removed by the creditors' proceeding under which it had acquired title. Hofstetter was not a creditor of the traction company, and had no right to have its property applied to the payment of his judgment against the Overland Railroad Company. Of course, if Hofstetter's claim had constituted a lien from the time he sustained his injury, and that lien antedated the judicial sale under which the traction company became a purchaser, the title thus acquired would have followed the property; he not being a party to that proceeding. But there is no pretense that Hofstetter had any description of lien, and no kind of excuse for paying him out of the property of the traction company; that property being subject only to such liens against the predecessor company as had not been cut off by the creditors' proceeding under which it acquired title. This objection, we think, arises under the fourth and fifth assignments of error, and under the second exception taken to the master's report. It is true that neither the exceptions to that report, nor the assignments of error, present this question as clearly and definitely as it might and should be presented; but the injustice done by the decree below is so apparent that this court is disposed, in so meritorious a matter, to construe both exceptions and assignments of error with a degree of liberality which it would not exercise in a less meritorious

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defense. The decree must be reversed, and the petition of Hofstetter dismissed, with costs.

NOTE.

Claims for Personal Injuries—When Liens.—Section 1309 of the Code of Iowa, making judgments for personal injuries prior to the liens of judgments and trust deeds, cannot be extended to embrace claims for such injuries, even though actions therefor be pending, and the purchaser of a railroad takes it free from such claims unless the same have been prosecuted to judgment. *Burlington, C. R. & M. R. Co. v. Keokuk & D. M. R. Co.*, 52 Iowa 97.

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AMERICAN LOAN & TRUST CO. *et al.*

(*Circuit Court of Appeals, Eighth Circuit, March 22, 1897.*)

Claims for Personal Injuries—Mortgage Liens—Priority.*—A claim by intervening petitions for damages for death which resulted from a negligent act of the mortgagor railroad company, committed prior to the appointment of a receiver in a suit brought to foreclose the mortgage, is not a preferential claim, which is entitled to be paid out of the income or the *corpus* of the mortgaged property, to the exclusion of the mortgage debt.

Same—Expenditures for Improvements Continued by Receiver—Sanction of Court Presumed.—Where the trustee under such mortgage was authorized by the mortgage to take possession of the railroad and make from time to time improvements required for the operation of the road at the expense of the trust estate, the receiver may be authorized to do so, and, in the absence of averments to the contrary in the intervening petition, it will be presumed on appeal that he was authorized by the court to make such expenditures.

Same.—And such interveners would have had no right to complain, even if the trustee had misappropriated the gross income of the railroad while in his possession.

Pleading—Legal Conclusions.—The intervening petition stated that such death occurred while the road was being operated by the agent of the mortgage bondholders; and that petitioners' claims, founded upon judgments in actions for such death, were therefore entitled to priority of payment out of the income of the road while

*See *Farmers' Loan & Trust Co. v. Northern Pac. R. Co. et al.*, (C. C. A.) 9 Am. & Eng. R. Cas., N. S., 81, and *foot-note*.

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operated by the receiver. *Held*, that the first statement was the statement of a legal conclusion, and not sufficiently sustained by the facts alleged.

Surplus Income—Judgment Creditors—Bondholders—Priority.—The claims of general creditors whose demands, whether arising out of contract or tort, have been reduced to judgment are as much entitled to payment out of the surplus income of the road which accumulated while the road was being operated by a receiver appointed at the instance of stockholders, before the income had been impounded by the mortgage bondholders, as the latter; and if there are equitable reasons to the contrary, the bondholders, the appellees, must show them by proper averments.

APPEAL by plaintiff from the Circuit Court of the United States for the District of Colorado. *Remanded.*

W. H. Bryant (*C. S. Thomas* and *H. H. Lee* with him on the brief), for appellants.

E. E. Whitted (*Henry W. Hobson* with him on the brief), for appellees.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge. This is an appeal from an order sustaining a demurrer to an intervening petition in an equity suit, and directing a dismissal of the same, on the ground that the averments thereof did not entitle the interveners to the relief prayed for. The facts disclosed by the intervening petition (hereafter termed the "complaint") are substantially these: Addie Veatch and Emma Henderson, who are the appellants and interveners, respectively recovered judgments against the Union Pacific, Denver & Gulf Railway Company (hereafter termed the "Denver & Gulf Company"), on June 1, 1895, each judgment being for the sum of \$5,000. The suits in which the judgments were obtained were brought to recover the damages sustained on account of the death of two persons, to wit, William E. Nye, who was the son of Addie Veatch, and Harry Henderson, who was the husband of Emma Henderson, both of whom were employees of the Denver & Gulf Company, the one being a fireman, and the other an engineer, and both of whom were killed on or about July 27, 1893, in a railroad accident

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which occurred on the railroad of said Denver & Gulf Company, through its fault and negligence, by reason of the fall of a defective railroad bridge or trestle. The railroad of the Denver & Gulf Company was controlled by the Union Pacific Railway Company, under a contract with the former company, the terms of which are not shown. On or about October 12, 1893, succeeding the accident, receivers were appointed for the Union Pacific Railway Company, who forthwith assumed charge of the Denver & Gulf Railroad, as a part of the Union Pacific System, and operated it until December 18, 1893. At the latter date, in a suit which had been brought by John Evans, a stockholder of the Denver & Gulf Company, against said company, in the circuit court of the United States for the district of Colorado, Frank Trumbull was appointed receiver of the latter company, and forthwith took possession of all its property, and thereafter operated its road under said appointment until October 31, 1894, when he was further appointed receiver of the same property in a suit brought by the American Loan & Trust Company, as trustee of certain mortgage bondholders, against the Denver & Gulf Company, to foreclose the consolidated mortgage on its road. After the latter suit was brought, and on October 31, 1894, an order was entered in said suit consolidating it with the previous suit which had been brought by John Evans, as a stockholder of the Denver & Gulf Company.

The interveners based their right to an order directing Frank Trumbull, the receiver, to pay their judgments out of the funds in his hands, on five different grounds, which were stated in detail in the complaint. The first was, in substance, that, as the claims on which the judgments were founded accrued within a period of 90 days before the Denver & Gulf Railway first passed into the hands of a receiver, the claims should be treated as ordinary operating expenses, and paid in preference to the mortgage bonds, which the American Loan & Trust Company was seeking to collect in its suit for foreclosure. The second ground was that the

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holders of mortgage bonds, whose mortgage was being foreclosed by the American Loan & Trust Company, were, in legal effect, operating the Denver and Gulf Railway when the injuries complained of were sustained. In this behalf it was alleged, in substance, that the Denver & Gulf Company had issued stock to an amount exceeding \$32,000,000, and mortgage bonds in the sum of \$15,801,000, for the purpose of defrauding the public, inasmuch as the aggregate value of its corporate property at the date of such issue did not exceed \$15,000,000; that the Union Pacific Railway Company had guarantied the payment of said bonds, and had become the purchaser of said bonds to an amount exceeding \$12,000,000, and an owner of said stock to an amount exceeding \$13,000,000, and had assumed the management and control of the railroad of the Denver & Gulf Company, with full knowledge that it could never pay operating expenses and the interest on its bonds. In view of the premises, the interveners charged that from the date of its organization, in the year 1890, until October, 1893, when receivers were first appointed, the Denver & Gulf Railway was operated by the Union Pacific Railway Company for and in behalf of the mortgage bondholders of the Denver & Gulf Company, and that said bondholders were responsible for whatever liabilities, whether for negligent acts or otherwise, had been incurred in the meantime. The third alleged ground of recovery was that between October 12, 1893, when receivers first took charge of the Denver & Gulf Railway, and October 31, 1894, when a receiver was appointed in the bondholders' suit, a large sum of income had been received by the receiver from the operation of the road, which, in equity, ought to be appropriated to the payment of the interveners' claims. In this behalf the allegations were, in substance, that the consolidated mortgage in which the American Loan & Trust Company was named as trustee did not pledge, or attempt to pledge, the income of the mortgaged property for the payment of the bonds issued by the Denver & Gulf Company; that the bond-

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holders had no claim on the income of the mortgaged property until they had actually taken possession of the property for a default, either in the payment of interest or principal of the mortgage debt; that prior to October 31, 1894, when such possession was first taken, the said Frank Trumbull, acting as receiver in the stockholders' suit brought by John Evans, had realized from the operation of the railroad of the Denver & Gulf Company a sum exceeding \$400,000, in excess of operating expenses, on which the bondholders had no claim; and that this sum should be devoted to the payment of the claims of general creditors, and particularly to the payment of the interveners' judgments. The fourth ground of recovery stated in the complaint alleged a diversion of funds by the receiver, Frank Trumbull, to the prejudice of the interveners. In this behalf it was charged, in substance, that while the said receiver had been in charge of the mortgaged property, as receiver in the bondholders' suit, he had expended the surplus income, not in paying the interest and principal of the mortgage debt, but in making permanent and costly improvements on the mortgaged property, and in the purchase of rolling stock. Because of such alleged diversion of funds, the interveners claimed that their judgments should be paid out of current income. The fifth and last ground of recovery alleged a wrongful diversion of funds by the Union Pacific Railway Company during the period of its alleged operation of the Denver & Gulf Railroad, prior to the appointment of receivers, on October 12, 1893. In this behalf, the allegations were, in substance, that, under the contract between the Union Pacific Railway Company and the Denver & Gulf Company for the operation of its road, the former company was in duty bound to apply the income from its operation—First, to the payment of operating expenses, and, second, to the payment of interest on bonds; that, instead of doing so, it had appropriated income, which should have been used for paying operating expenses, to making permanent improvements on the Denver & Gulf

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Railroad, and to the payment of interest charges on bonds; that during the 90 days succeeding July 27, 1893, when the accident occurred, it had thus appropriated about \$103,000, of which sum \$93,000 had been expended in paying interest on bonds that were secured by an underlying mortgage on a part of the Denver & Gulf road, which was executed by a corporation known as the Colorado Central Railroad Company, and \$10,000 in making permanent improvements on the road. Because of such alleged diversion of income by the Union Pacific Railway Company, the interveners claimed that they were entitled to an order for the payment of their judgments out of current income.

In so far as the interveners' claims for allowances against funds in the hands of the receiver are based on

Claims for Personal Injuries—
Mortgage Liens—
Priority.

the first ground above stated, they are concluded by the decision of this court in *Trust Co. v. Riley*, 36 U. S. App. 100, 16 C. C. A. 610, and 70 Fed. 32, and the order applied for must be refused. We held in that case, after a review of all the decisions, that a claim for damages for personal injuries which were the result of a negligent act of the mortgagor company, committed before the appointment of a receiver in a suit brought to foreclose a mortgage, is not a preferential claim, which is entitled to be paid out of the income or the corpus of the mortgaged property, to the exclusion of the mortgage debt. We are satisfied that the views expressed in that decision are sound, and fully sustained by the authorities cited. Without indulging in further discussion of the subject, therefore, we shall content ourselves with what was said in that case.

Neither are we able to decide that the interveners showed that they were entitled to the relief prayed for

Same—Expenditures for Improvements Continued by Receiver—Sanction of Court Presumed.

by reason of the alleged diversion of income, described in the fourth and fifth paragraphs of the complaint. It appears from the allegations of the complaint that under the provisions of the consolidated mortgage, in which the American Loan & Trust Company was

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named as trustee, the trustee was authorized, in case of a default occurring under the mortgage, to take possession of the mortgaged property ; and, in the event of so doing, it was empowered, among other things, "to make from time to time, at the expense of the trust estate, such repairs, alterations, additions, and improvements, as well in respect of the rolling stock and equipment as in respect of the railway, and to do all such other things, as the trustee shall think proper to promote the interests which the holders of the bonds hereby secured have under this mortgage." The mortgage clearly authorized an expenditure of the income of the mortgaged property by the trustee when he should have taken possession of the property, to such extent as the trustee deemed proper in improving the property and in purchasing rolling stock and other necessary equipment and materials ; and we perceive no reason why the court by whom the receiver was appointed might not authorize him to make similar expenditures, if it deemed the same necessary and proper. The complaint does not show that the expenditures alleged to have been made by the receiver subsequent to October 31, 1894, were unauthorized by the court under whose orders he acted ; and, in the absence of such an averment, we must presume that they were duly sanctioned and approved. Expenditures of income thus made cannot be regarded as a wrongful diversion of funds, such as will entitle the interveners to the payment of their judgments out of the current income of the property, inasmuch as the claims upon which the judgments are founded were in no sense of a preferential character.

There is even less reason, we think, for holding that the alleged expenditures of income by the Union Pacific Railway Company prior to October 12, 1893, constitute a diversion of funds, which would have authorized the circuit court to direct the payment of the interveners' judgments out of current income. If no contract had existed between the Union Pacific Railway Company and the Denver &

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Gulf Company relative to the operation of the road of the latter company, it is obvious that the Denver & Gulf Company would have been at liberty to expend its income in improving and extending its roadbed, purchasing rolling stock, and paying its fixed charges. It could not have been said that it was guilty of any wrong in making such use of its income, in place of using it to discharge liabilities for injuries to persons or property. The Denver & Gulf Company is not here complaining that the Union Pacific Railway Company has violated that provision of its contract for the operation of the Denver & Gulf Railroad which required the appropriation of the gross income, first, to the payment of operating expenses; and we think that it only lies in the mouth of that company to make such a complaint. We are unable to hold, therefore, that the breach of the provision of the alleged agreement in the respects stated in the complaint constitutes a diversion of funds, which entitles the interveners to relief in this proceeding.

The second ground of recovery stated in the complaint, as heretofore explained, seems to be that, when the injuries were sustained on which the interveners' claims are founded, the Denver & Gulf Railroad was being operated by the Union Pacific Railway Company as the agent of the bondholders, who are represented in this proceeding by the American Loan & Trust Company. It is charged, in effect, that, because of such operation of the road by an agent of the bondholders, the latter are personally liable for the injuries in question, and cannot complain if the judgments are paid out of the income of the mortgaged property as it is realized by the receiver. But this charge that the Denver and Gulf Railroad was being operated by the bondholders at the date above mentioned is a conclusion of the pleader, and the facts on which that conclusion is based do not warrant it, or, at least, they do not show with sufficient certainty that it is well founded. The facts alleged are that the Denver & Gulf Company was over capital-

Pleading—Legal
Conclusions.

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ized; that it issued more stock and bonds than it was entitled to under the laws of Colorado; that the Union Pacific Railway Company guarantied the payment of the bonds, and purchased a large part of the same, and also became the owner of a large part of the stock of the Denver & Gulf company; that a contract of some sort, the precise nature of which is not stated, was thereupon entered into between the Union Pacific Railway Company and the Denver & Gulf Company, under which the former company practically controlled the management of the Denver & Gulf System; and that such contract was made by the Union Pacific Railway Company knowing that the road of the Denver & Gulf Company could not be made to pay operating expenses and fixed charges; and that the stockholders of the road could not hope for any return from their investment in the stock. The complaint does not show, however, that the bonds secured by the consolidated mortgage were or are void, because the Union Pacific Railway Company is alleged to have purchased said bonds to an amount exceeding \$12,000,000, which implies that it paid value therefor to the mortgagor company. Neither does the complaint show that, at the date of the injuries complained of, the Union Pacific Railway Company continued to own the bonds which it had purchased and guarantied. The fair and reasonable inference is, we think, that, when the foreclosure suit was instituted, many, if not all, of the bonds, had passed into the possession of innocent purchasers for value, who are now represented by the American Loan & Trust Company. Moreover, as the interveners' judgments were recovered against the Denver & Gulf Company, and not against the Union Pacific Railway Company, they must have alleged and shown, in the suits in which the judgments were recovered, that the Denver & Gulf Company was operating its road when the injuries complained of were sustained. In view of these considerations, we think that the allegations found in what is termed the second cause of action stated in the complaint are altogether insufficient to warrant us in

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holding that the bondholders under the consolidated mortgage were in fact operating the Denver & Gulf Railroad when the injuries complained of were sustained, and that for such reason the interveners' judgments ought to be paid out of the current income of the mortgaged property. In our opinion, the complaint is too vague and general, and does not state the necessary facts to justify such a conclusion.

While we entertain the views heretofore expressed concerning the first, second, fourth, and fifth grounds of recovery or causes of action stated in the intervening complaint, yet we have not been able to concur in the view which seems to have been entertained by the circuit court respecting the third cause of action. In that paragraph of the complaint it was averred, as we have before said, that while the receiver operated the Denver & Gulf Railroad under his appointment in the stockholders' suit brought by John Evans, and prior to the filing of the bill of foreclosure by the American Loan & Trust Company, he realized of net income, over and above operating expenses, a sum exceeding \$400,000,

Surplus In-
come—Judg-
ment Credi-
tors—Bond-
holders—Pri-
ority.

to which the lien of the consolidated mortgage did not attach. If this be so (and for the purposes of this case the allegations must be taken as true), we perceive no reason why the interveners are not equitably entitled to have the whole or a part of their judgments paid out of the surplus income in question. It cannot be admitted that the mortgage bondholders, having no lien on the fund in question, are entitled to absorb the entire amount, to the exclusion of general creditors. The claims of general creditors whose demands, whether arising out of contract or tort, have been reduced to judgment, would seem to be as meritorious as the claims of the mortgage bondholders, and as much entitled as theirs to participate in the distribution of the surplus income which accumulated while the road was being operated by the receiver, at the instance of stockholders, before the income had been impounded by the mortgage bondholders. *Sage v. Railroad Co.*, 125 U. S. 361, 378, 379, 8

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Sup. Ct. 887. It may be that there are equitable considerations not disclosed by this record, which would alter the existing aspect of the case, and warrant the court in rejecting the interveners' claims, even as against the surplus income which was realized by the receiver prior to October 31, 1894. If such considerations exist, they should be shown by the appellees by proper averment. We think that the demurrer was not properly sustained to the entire complaint, but that the appellees should have been required to answer as to the facts averred in the third cause of action. The order sustaining the demurrer to the intervening petition, and directing a dismissal thereof, is therefore reversed, and the cause is remanded to the circuit court for further proceedings therein not inconsistent with this opinion.

VEATCH *et al.*

v.

AMERICAN LOAN & TRUST CO. *et al.*

(*Circuit Court of Appeals, Eighth Circuit, Dec. 6, 1897.*)

Receivers—Actions by Judgment Creditors—Sufficiency of Complaint.—In an action against a receiver to enforce the payment of a judgment against the railroad operated by defendant, the complaint need not aver that the net earnings of the road during such operation, alleged therein to be applicable to the payment of such judgment, have not been otherwise appropriated, it not being plaintiff's duty to anticipate the defense.

Same—Preferences.—A railroad mortgage does not become entitled to priority of payment out of the surplus earnings of the road while operated by a stockholder's receiver over a judgment, until a bill has been filed for its foreclosure.

PETITION for rehearing. For former opinion, see preceding case.

Before BREWER, Circuit Justice, and SANBORN and THAYER, Circuit Judges.

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BREWER, Circuit Justice. A petition for a rehearing has been filed by the appellees in this case, in which they challenge so much of the ruling of this court as sustained the third cause of action stated in the intervening complaint of appellants.

Case Stated.

We shall not stop to restate the facts at length, but refer to the opinion heretofore filed for a full statement thereof. It is enough now to say that the appellants, on June 1, 1895, recovered judgments against the Union Pacific, Denver & Gulf Railway Company, in actions for torts. These torts took place on the 27th of July, 1893. On October 12, 1893, the railroad was taken possession of by the receivers of the Union Pacific Railway Company, that company having been theretofore operating the Union Pacific, Denver & Gulf Railroad. These receivers continued in possession until December 18, 1893, when a suit was begun by one of the stockholders of the Union Pacific, Denver & Gulf Railway Company. In that suit Frank Trumbull was appointed a receiver, and forthwith took possession of the property of the company, and continued operating the road, as such receiver, until October 31, 1894, when he was again appointed receiver of the same property in a suit brought by the American Loan & Trust Company, as trustee of certain mortgage bondholders. On the same day an order was entered in the latter suit, consolidating it with the one brought by the stockholders. The allegations of the third cause of action are that while Trumbull, as receiver, was operating the road, under the appointment made in the stockholders' suit, he realized from the operation of the railroad a sum exceeding \$400,000 in excess of taxes and operating expenses, and that this sum was now, or ought to be, in his possession as receiver. It was not affirmatively stated that such sum had not been paid out under orders of the court, nor that it had not been appropriated in payment of interest or principal of mortgage indebtedness nor that it was not necessary therefor. The case is left on the simple showing of a tort prior to any receivership, of a judgment therefor

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after the receivership at the instance of the mortgagee, of an intervening receivership at the instance of a stockholder, and a net income during such receivership of more than enough to pay the judgment.

Involved in the matter thus called to our attention is a question of pleading. If the case is to be considered as though the other causes of action had been stricken out, then the question presented arises upon the facts as above stated. It is insisted, however, by the appellees, that in other portions of the complaint it is affirmatively shown that this accumulation of net income had been disposed of, and was no longer in the hands of the receiver. A distinct charge in one count of a complaint is not, however, to be overthrown by any mere inferences from matters alleged in other counts. It may be that, if such disposal was distinctly averred elsewhere in this complaint and in either of the other counts, we should be compelled to take notice of such averment, and consider whether the disposition thus shown was one which defeated appellants' right to recover; but, as we read the complaint, there is no such distinct averment, or at least none which shows a disposal by the receiver of the whole \$400,000. It is in the light of this construction of the complaint that we proceed to reconsider the question presented upon the facts stated in the third cause of action.

*Receivers—Actions
by Judgment Cred-
itors—Sufficiency
of Complaint.*

It is true, the pleader does not negative any disposal of these earnings. He simply alleges that they are still in the hands of the receiver, or, if diverted by him, should in equity be restored to the income account. Was it necessary that he should negative the fact of disposal, or, in case other disposition had been made, show for what purpose it had been made, in order that the court might determine whether that disposition was rightful? We think not. It was enough for the pleader to aver the accumulation of this fund, and that it had passed into the hands of the present receiver. If he had disposed of it in such a way as to prevent its appropriation to the payment of appellants' claim, it

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was matter of defense, and to be by him set up. A plaintiff is not compelled to show that there cannot be any defense. It is enough for him to allege a state of facts which show *prima facie* a right of recovery.

Turning now to the question of law, it will be noticed that a railroad receivership may be at the instance of the mortgagee, or of a judgment creditor, or of a stockholder. If at the instance of the mortgagee, the income is impounded for its benefit; if of a judgment creditor, for the payment of his judgment. There is in the latter case an equitable levy on such income, and the mortgagee can claim no superior right thereto.

In *Sage v. Railroad Co.*, 125 U. S. 361, 377, 379, 8 Sup. Ct. 887, 892, it was said :

“Had the receiver never been appointed, and had the railroad company operated the property just as the receiver did, producing the same amount of net earnings that were in the hands of the receiver, at the time of his discharge, would the trustees in the mortgage of May 1, 1877, have been entitled to demand that such earnings be paid over to them? Clearly not. ‘It is well settled’, this court said in *Dow v. Railroad Co.*, 124 U. S. 652, 654, 8 Sup. Ct. 673, 674, ‘that the mortgagor of a railroad, even though the mortgage covers income, cannot be required to account to the mortgagee for earnings, while the property remains in his possession, until a demand has been made on him therefor, or for a surrender of the possession under the provisions of the mortgage. That is the effect of what was decided by this court in *Railroad Co. v. Cowdrey*, 11 Wall. 459, 483.’ See, also, *Gilman v. Telegraph Co.*, 91 U. S. 603; *Bridge Co. v. Heidelberg*, 94 U. S. 798; *Kountze v. Hotel Co.*, 107 U. S. 378, 2 Sup. Ct. 911; *Teal v. Walker*, 111 U. S. 242, 250, 4 Sup. Ct. 420. * * * If the trustees, pending the receivership, had intervened and asked possession of the property, they might perhaps have been entitled, as against general creditors, to the income of the property thereafter accruing, upon the principles announced by this court in *Dow v. Railroad Co.* (as

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reorganized) 124 U. S. 652, 8 Sup. Ct. 673: But we do not perceive any legal ground upon which they are entitled to the net earnings of the property while it was in the hands of the receiver, in a suit instituted by a judgment creditor for the protection of his own interests, and not of the interests of the trustees, or of the bondholders, or of other creditors. His suit was in effect, an equitable levy for his benefit, upon the net income of the property. Other creditors, who filed their claims, based upon judgments, gain nothing, as between themselves and Sage, by the fact that their judgments were rendered upon coupons, which were secured by lien upon the mortgaged property."

When, as in this case, a receiver is appointed at the instance of a stockholder, to whom does any surplus income belong, and what power of disposition of such income has either the receiver or the court appointing him? Before any receivership, and while the railroad property is being operated by the company mortgagor, it has all the rights of an owner in respect to the income. It may not, of course, convey away the fixed property so as to relieve it from the lien of the mortgage; but it may use the income in the payment of such debts as it sees fit, and if, in the absence of any special statute, it elects to pay a general creditor, or one who has simply a claim for damages on account of a tort, instead of paying interest or principal of its mortgage debt, the mortgagee has no recourse against the party thus receiving payment to compel reimbursement. In other words, the mortgagor's power over the income is the same as though there were no mortgage debt. It may prefer whatever creditor or claimant it pleases, and, provided it pays only a just debt or an honest claim, a secured creditor has no ground of action against the party thus paid. But this absolute freedom of disposition ceases when a receiver is appointed. The moment the court takes possession of property, certain equitable rights exist, which cannot be ignored by receiver or court. The property and the income received therefrom is taken possession of by the court

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for the benefit, according to certain equitable rules, of all parties in interest. The mortgagee does not have those special rights to the income which it acquires when the receivership is at its instance. Not that its claims can be wholly ignored, but it can no longer insist that it has taken the special contract or statutory remedies for impounding the income. If, during this stockholder's receivership, there was, as alleged, accumulated \$400,000 of net income above both operating expenses and taxes, and that sum passed into the hands of the receiver appointed under the mortgage foreclosure proceedings, it may have been disposed of by him for one of three purposes,—either in payment of claims accruing prior to the stockholder's receivership, for betterments on the property, or in payment of interest or principal of mortgage indebtedness. The mere fact that the same person is appointed receiver under the mortgage foreclosure as was receiver under the stockholder's bill does not make the two proceedings identical. The case is the same as though a distinct party was appointed receiver under the foreclosure proceedings, to whom the railroad property was turned over by the prior receiver. There would then remain the duty of the court in respect to the prior receivership to administer the accumulated earnings in the hands of that receiver, and it would not necessarily follow that it was the duty of the court to turn those funds over to the second receiver for the sole benefit of the mortgagee.

Doubtless, the circuit court in which the foreclosure proceedings were pending was fully aware of the disposition, if any, made of these surplus earnings, and very likely the conclusion to which it came in sustaining the demurrer to the entire intervening complaint may have been influenced by such knowledge; but the record before us does not advise as to these matters, and it does not seem wise for us to determine, in ignorance of the facts, whether the disposal which has been made (if any has been made) was such a disposal as precluded these appellants from any claim against the

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receiver. It is settled that a claim for damages for personal injuries, such as were the claims of these appellants, is not a preferential debt. *Trust Co. v. Riley*, 36 U. S. App. 100, 16 C. C. A. 610, and 70 Fed. 32. And, if these surplus earnings have been appropriated in payment of preferential debts, it would follow that these appellants have no claim on account thereof. It may be that they had, before these claims for torts had passed by judgment into debts, been appropriated by order of the court in payment of interest on underlying mortgages, or of past-due interest on the mortgage in suit. In that case it would be a question of doubt as to whether there were any equities in behalf of these appellants to compel the mortgagees to, in effect, pay back interest which they had already received. Or it may be that, the present earnings of the road having been sufficient to pay all accumulated interest, the receiver has, by direction of the court, expended these past earnings in betterments on the property; and then it would become a still more serious question whether, not being necessary for interest, the court has power to expend such surplus earnings in mere improvements on the property mortgaged, leaving claims for torts unpaid. Particularly is this true if it should turn out that there is to be no sale of this property under the foreclosure proceedings, and it is to be surrendered to a reorganized company. But it hardly seems wise for us to speculate as to what the rights of the appellants might be under these various contingencies. We do not wish to be deciding moot cases. We think, therefore, that the appellees should be called upon to answer this third cause of action, and make full disclosure of the facts, and then there will be no difficulty in applying the law to the facts, and determining what are appellants' rights. The former decree of this court reversing the order and decree of the circuit court, and remanding the cause, with directions for further proceedings, is confirmed; and the stay of proceedings entered in this court on June 14, 1897, shall now cease, and a mandate will issue to the circuit court forthwith.

Henderson v. Detroit Citizens' St. Ry. Co

HENDERSON

v.

DETROIT CITIZENS' ST. RY. CO.

(Supreme Court of Michigan, March 22, 1898.)

Injury to Boy—Crossing in Front of Moving Street Car—Negligence—Instructions.—In an action against a street railway company for injuries sustained by a boy while attempting to cross its tracks in front of an approaching car, the evidence was conflicting, but some of plaintiff's own evidence tended to show that the boy should have seen the car before attempting to cross, and had sufficient intelligence to appreciate the risk attending such attempt.

Held, that it was error to instruct that "if you believe the plaintiff's side of the case and the plaintiff's witnesses, taking them in sides now, then the plaintiff has made out a case."

Same—Assumption of Risk.*—Where a boy has sufficient intelligence to appreciate the danger of attempting to cross the tracks in front of an approaching car, and has in mind the necessity of taking precautions, it is not necessary for him to have the full intelligence of an adult in order to assume the risk attending such attempt.

Same—Negligence—Unwarranted Instruction.—Where there was no evidence tending in the slightest degree to show that the boy was seen on the track by the motorman prior to the accident, and it appeared that he never was on the track, but came in contact with the car before reaching the track, it was error to submit to the jury the question whether or not the motorman could have stopped the car in time to prevent the injury after the motorman saw or should have seen the boy on the track.

Same—Contributory Negligence*—Direction of Verdict.—Where it appeared from the evidence that the injured boy was old enough to assume the risk attending an attempt to cross the track in front of a moving street car; and that he should have seen the car before making the attempt, it was error to refuse defendant's request to instruct that "under the pleadings and proofs, the plaintiff cannot recover."

ERROR by defendant to Wayne county circuit court.
Reversed.

Brennan, Donnelly & Van De Mark and Bernard R. Selling, for appellant.

John Galloway (Edwin Henderson, of counsel), for appellee.

*See note at end of case.

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MONTGOMERY, J. Plaintiff's son, Malcolm Henderson, was injured by contact with one of the cars of defendant. The plaintiff brings this action to recover for expenses incurred in nursing and caring for his son, and for medical attendance, medicines, etc. A verdict was recovered of \$203.50, upon which judgment was entered, and defendant brings error. The accident occurred on Woodward avenue, near its intersection with Humboldt avenue. At this place the defendant has double tracks. The car which struck plaintiff's son was going west. The testimony is conflicting as to whether it met an east-bound car at this point. Some of the testimony tended to show that the boy ran or walked past the rear of the east-bound car, and was immediately struck by the west-bound car; and other of the testimony tended to show that he went behind a coal wagon standing on the track, and came in collision with the west-bound car. The boy testified that he looked for the cars to see if they were coming, for the reason that he knew, if they did strike him, he would get hurt; that he went behind one car, and was struck by the other; that there was a coal wagon right on the track; that he just saw it, and looked that way to see if the car was coming; that he turned right behind the wagon, and did not run behind the car at all, and ran into the fender of the car that was going west; that, just as soon as he went behind the wagon, he was struck by the car; that he did not get across the track, and ran right into the fender; that he did not see the fender out from behind the wagon, because he did not look for that; that he looked to see if the car was coming. Again, on redirect examination he testified that he did see the car which did not strike him; that he ran right behind the coal wagon, and saw only the one car which did not strike him. Frank Almas, a witness for the plaintiff, testifies that he stood near the scene of the accident; that the boy was from 30 to 50 feet from him when he started to cross the street; that, when the boy started to cross the street, he was

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running, and ran up to the time he was struck ; that he saw the car the first time when it was about 25 feet from Humboldt avenue, and thought, when he saw the boy running across the street, he was bound to be struck by the car when he saw the car coming so fast ; that there was nothing to prevent the boy seeing the car if he had looked ; that he could see it as soon as witness could. The boy ran right into the car, or the car ran into him ; witness could not say which, but, after the accident, he was lying between the double tracks. He might have run against the car. Maude Wilson, a witness for the plaintiff, testified that she saw the car strike the boy, and throw him to the west ; that she did not hear any gong ringing ; that the boy was walking across the street. On cross-examination she testified that the boy passed behind a car going down town, maybe three or four feet, maybe not so far, and he was struck by the other car as he got past the car going down town ; that the car which struck him was not any distance away when he appeared upon the track ; that she thinks the side of the sign struck him. Edward Siebert testified that the boy was struck by the side of the car, but that he could not say whether the fender struck him or not ; that he struck the front part of the car, and bounced off, and fell on the ground. On cross-examination he testified that the boy did not completely get on the track of the west-bound car when he was struck with it ; that he could not say whether he walked into the car or not ; that, in his judgment, the car ran into him ; that he was not over two feet on the track when he was struck, but that he was struck in pretty near the corner of the car. Joseph Gomersall, a witness for the plaintiff, testified that he was driving a coal wagon west on Michigan avenue ; that he was in front of the blacksmith shop on the east side of Humboldt avenue when the accident happened ; that he saw no other coal wagon around there ; that he came onto Michigan avenue from Fifteenth street, and was traveling at a pretty good rate of speed ; that he had just reached the east crossing of Michigan avenue and

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Humboldt, and the west-bound car went down, and up came the east-bound ; that he saw the boy leave the sidewalk, and the west-bound car came on, and he could not see the car strike the boy because he was on the wrong side for that. On cross-examination this witness testified that the east-bound car was nearly one-half block away when the boy stepped on the track on which it was traveling ; that it was a good one-half block away ; that the witness could not see when the east and west bound cars passed each other, as they were behind him when they passed. This, with other testimony showing that the car in question was traveling at an unusual rate of speed, and tending to show that the gong was not sounded, comprised the testimony offered by the plaintiff bearing on the *res gestæ*. The plaintiff also testified that he had frequently cautioned his son to always be careful, and look both ways, before he attempted to cross the street, and that the boy must have comprehended what he said, and that, in his judgment, he was perfectly competent to take care of himself on the street. Defendant offered testimony showing a somewhat different state of facts, but we deem it unnecessary to quote the testimony at any length, as the questions raised depend upon the case as made by plaintiff's testimony.

The defendant preferred the following requests : "Under the pleadings and proofs, the plaintiff cannot recover." "It is entirely immaterial in this case at what rate of speed the car was going, for the undisputed testimony of all witnesses is that, after the boy approached the car, it was impossible to have stopped it before the collision occurred." "If you find that Malcolm Henderson, the boy who was hurt, had been warned repeatedly by his father of the danger of crossing the car tracks on Michigan avenue without looking to see whether a street car was coming, and that the boy himself appreciated the danger of going upon the tracks of the defendant, then your verdict must be for the defendant, and be no cause of action." "If you find that Malcolm Henderson ran from behind a coal

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wagon or behind a car directly into the fender or side of defendant's car, your verdict must be for the defendant." The court refused to give the first, second, and last of these requests, and modified the fifth by adding: "That is, if he was a grown person under the circumstances, or if he had the intelligence of a grown person fully." Assignments of error are based upon the refusal of the defendant's several requests, the modification of the fifth request, and the instruction of the court given on its own motion.

Error is assigned on that portion of the general charge which reads: "If you believe the plaintiff's side of the case and the plaintiff's witnesses, taking them in sides now, then the plaintiff has made out a case." This method of submitting a case, always dangerous, was obviously damaging to the defendant in this case, for, in my view of the case, many of the facts testified to by plaintiff's witnesses might be true, and yet no liability exist.

We also think the modification of the fifth request was error. The circuit judge evidently had on his mind the case of *Baker v. Railroad Co.*, 68 Mich. 90, 35 N. W. 836, which case certainly goes to the extreme limit in permitting recovery by a child somewhat younger than the son of the plaintiff in the present case; but the court in that case held that the question of contributory negligence was for the jury for the reason that, under the facts of that case, it was for the jury to determine whether the lad had such judgment and such comprehension as to enable him to appreciate the danger, and subject him to the consequences of negligence if he failed to use his reason and senses in an effort to avoid it. But the instruction of the learned circuit judge in this case relieved the jury of the duty of passing on the question of whether plaintiff's son had such appreciation of the danger as to render him subject to the consequences for a failure to use his reason and senses in an effort to avoid it. The modification of the request

Injury to Boy—
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in question was by adding: "That is, if he was a grown person under the circumstances, or if he had the intelligence of a grown person fully." It is hardly necessary to say that this test is too liberal. If the boy had sufficient intelligence to appreciate the danger, and had in mind the necessity of taking precautions, it is not necessary that he had the intelligence of an adult fully.

Another instruction is objected to, which was as follows: "This negligence must consist of either failing to give the proper warning of the approach of the car, or of failure to stop the car after the perilous position of the son of the plaintiff was discovered by the motorman, if he could with reasonable care discover it. That is qualified a little, and this I leave to the jury: whether it was possible, by diligent endeavors of the motorman, to stop the car after the boy came from behind the coal wagon, or whatever he did after he came upon the track, or we will say within reach." We think, upon the case made by the plaintiff, this instruction was misleading. There was no evidence which would have justified the jury in finding, or which tended in the slightest degree to show, that the position of this boy on the track was discovered in time to avoid the injury. On the contrary, it appears that the boy never was upon the track; that he came in contact with the car on reaching the track; and his own theory was that he passed as far forward as he went, before being struck, from behind an obstacle which obstructed his vision, and would equally have obstructed the vision of the motorman, and the evidence shows that he was at the time on a run.

It is evident that this verdict cannot stand, but the more doubtful question is presented as to whether the first request of defendant should have been given. In my opinion, upon this record, it should have been. See *Ecliff v. Railway Co.*, 64 Mich. 196, 31 N. W. 180. The plaintiff himself testified that this boy had intelligence

Same—Negligence
—Unwarranted In-
struction.

Same—Contribu-
tory Negligence—
Direction of Ver-
dict.

Note

enough to appreciate the danger. He placed the boy on the stand, and he so testified. The evidence clearly shows that there was nothing except this wagon and the east-bound car to obstruct the vision. Witnesses for the plaintiff state that, if the boy looked in the direction of the car, he could have seen it. It was but common prudence in crossing such a thoroughfare to look, not only for the car, but for any vehicle which might be coming. Injury would have occurred from collision with an ordinary wagon just as surely as from running into this car, and, from the testimony of the lad himself, he had intelligence enough at the time to know this. Why, then, should it be left for the jury to say that he had not?

Error is assigned upon certain language employed by plaintiff's counsel upon the argument, but, as the case is reversed upon other grounds, it is not necessary to consider the objection at length. We find in the record language which ought not to have been employed, but, as it is not likely to be repeated, it is not necessary to quote it. Judgment will be reversed, and a new trial ordered. The other justices concurred.

NOTE.

Children—Running in Front of Moving Street Car—Contributory Negligence.—See *Moss et ux* in 6 Am. & Eng. R. Cas., N. S., p. 690 and *note* p. 692. An intelligent child ten years old was crossing a public street by a diagonal cross-walk. There were no obstructions to view, and no passing vehicles except a horse-car coming in a direction toward the child, and which, had she looked in the direction she was moving, must have been seen by her long before reaching the track. A verdict that she did not negligently contribute to an injury received by being knocked down by the horses attached to the car, cannot be sustained. *Sheets v. Connolly St. R. Co.*, 54 N. J. L. 518, 24 Atl. Rep. 483.

A boy eight years old, after he sees a car coming in time to avoid it, cannot voluntarily assume the risk of crossing the track and recover for an injury arising from the failure of his experiment. *Motel v. Sixth Ave. R. Co.*, 99 N. Y. 632, 2 How. Pr. N. S. 30.

A boy of twelve attempted to cross a street in front of a moving car, but instead of passing in front of the horses he came against the dashboard and was injured. There was no proof that the speed of the car was increased, or of any other negligence on the part of

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the driver. It seemed to be purely a case of a careless boy being led into danger by an error of judgment in thinking he could cross in front of the horses. *Held*, that the company was not liable. *Manahan v. Steinway & H. P. R. Co.*, 125 N. Y. 760, 35 N. Y. S. R. 813.

Where a boy of eight admits that he knew it was dangerous to try to cross the street, in front of a moving car, and it appears that he saw the car and had time to avoid it, he must be held to have voluntarily assumed the risk, and cannot recover if he is injured. *Motel v. Sixth Ave. R. Co.*, 2 How. Pr. N. S. (N. Y.) 30.

The rule respecting contributory negligence presupposes sufficient intelligence to know the existence of danger. *Walters v. Chicago, R. I. & P. R. Co.*, 41 Iowa 71.

The law fixes no certain age at which children are of sufficient intelligence to have imposed upon them the full degree of care incumbent upon persons of mature age. *Houston & T. C. R. Co. v. Simpson*, 60 Tex. 103.

A child, to the extent that it has knowledge and understanding of a danger, or where it is of such nature as to be obvious even to one of his years, is under a legal duty to avoid it. *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270, 13 S. W. Rep. 889, 14 S. W. Rep. 760.

The degree of care required of an infant, the omission of which will constitute negligence on his part, is to be measured in each case by the maturity and capacity of the individual. *Thurber v. Harlem Bridge, M. & F. R. Co.*, 60 N. Y. 326, 10 Am. Ry. Rep. 126; *Chicago & A. R. Co. v. Murray*, 71 Ill. 601; *Washington & G. R. Co. v. Gladmon*, 15 Wall. (U. S.) 401, 4 Am. Ry. Rep. 500; *Moore v. Metropolitan R. Co.*, 2 Mackey (D. C.) 437; *Kansas Pac. R. Co. v. Whippie*, 37 Am. & Eng. R. Cas. 320, 39 Kan. 531, 18 Pac. Rep. 730; *Duffy v. Missouri Pac. R. Co.*, 19 Mo. App. 380; *Boland v. Missouri R. Co.*, 36 Mo. 484.

In determining the contributory negligence of a child its intelligence must be considered, for a child's care must be measured by its intelligence whether it be actor or sufferer. *Gulf, C. & S. F. R. Co. v. McWhirter*, 77 Tex. 356, 14 S. W. Rep. 26.

PERRY

v.

MACON CONSOL. ST. R. CO.

(*Supreme Court of Georgia, July 28, 1897.*)

Injury to Child on Street Railway Track—Running in Front of Moving Car—Contributory Negligence.*—In an action against a street-railroad company by a minor to recover damages for personal

*See note to preceding case.

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injuries sustained by being run over by a moving car, when it appeared by the evidence for the plaintiff that there was a pile of lumber in the street on one side of and near the railroad track, not placed there by the defendant, behind which the plaintiff and other boys were playing, and as the car approached the end of such pile of lumber the plaintiff suddenly ran on the track immediately in front of or against the front part of the moving car, and was struck and injured, and when it further appeared by the same evidence that the line of track, in the approach to and at the place where the accident occurred, was open to the view of the motorman and free from obstruction, that the car was not being run at a reckless and unusual rate of speed, and that the plaintiff could not have been seen from the car until he came on or within 30 inches of the track, and that as soon as plaintiff came on or near the track the brakes were applied and every effort made to stop the car, it was not error to grant a nonsuit.

Same—Obstruction Near Track—Failure to Signal.—It affirmatively appearing that the motorman could not have seen the plaintiff in the street before he appeared on or near the track or knew he was there, and there being no proof that such place was used by children in playing, or that there was anything to put the motorman on notice that persons were accustomed to be behind the pile of lumber, or that on this particular occasion children were in fact playing about and behind the same, his failure to sound the gong on approaching such pile of lumber was not negligent relatively to one who ran out suddenly in front of a moving car or against it, so as to authorize the latter to recover for injuries so sustained, when no negligence on the part of the motorman is shown in his efforts to stop the car and prevent the injuries when the person first came on or near the track, but, on the contrary, it affirmatively appeared that the brakes were promptly applied and the car stopped as soon as possible. (a) This is true, even though the person injured be a minor of tender years.

ATKINSON, J., dissenting.

(Syllabus by the Court.)

ERROR by plaintiff from Bibb county superior court.
Affirmed.

Dessan & Hodges, for plaintiff in error.

Bacon, Miller & Brunson, for defendant in error.

LITTLE, J. The pleadings and facts, so far as material to the questions made in the present case, are as follows: M. M. Perry, as next friend of Emmett Perry, filed his petition in the superior court of Bibb county, alleging, in substance, that the Macon Consolidated Street-Railroad Company, owning and operating a line of street and suburban street railroad in the city of Macon and county of Bibb,

Case Stated.

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had injured and damaged petitioner in the sum of \$15,000, for that, on or about the 1st day of April, 1893, said Emmett Perry, who is the minor son of petitioner, and about the age of six years, was injured and damaged by said railroad company in the following manner: On said day above mentioned said Emmett Perry was playing with four of his companions, of about the same age, upon the sidewalk upon Fourth street, in the city of Macon, near the store of N. B. Johnson. That there was situated near said sidewalk a pile of lumber about 14 feet high and 40 feet long. That this lumber was placed about 3½ feet from the sidewalk on Fourth street, and about 14 inches from the railroad track owned by said railroad company. That said children were playing upon the sidewalk at a point about 75 yards from the residence of said Emmett Perry, and, while thus engaged in play, said Emmett Perry started to cross said Fourth street, leaving sidewalk at a point just above said pile of lumber, and at the same time there came along said railroad track an electric car operated by the defendant. That said Emmett Perry could not see the car by reason of said pile of lumber. That said car was running at a rapid rate of speed, coming along Fourth street at the rate of 14 miles an hour. That said Emmett Perry attempted to cross the track. That the car struck him on the back of the head, about nine feet below the pile of lumber, and knocked him down, the wheels of the car passing over his left arm, grinding and lacerating the same. That said car was running at such a rate of speed that the motorman in charge of the same could not stop the car until it had passed over said Emmett Perry a distance of 16 or 18 feet. That said defendant, its agents, servants, etc., were negligent in not seeing said child as he attempted to cross the track, and were further negligent in that said car was running at a rate of speed within the limits of the city of Macon that was unlawful and illegal by the ordinances of the city. That said car was not under proper control, and that, if the same had been running at a proper rate of speed, the

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motorman could have stopped the car within a distance of 9 or 10 feet, and the same would not have struck said Emmett Perry. That defendant, its agents, servants, etc., were further negligent in that they did not see and did not keep a lookout for foot passengers upon said street and public highway. The petition contains further allegations to the effect that the injury was caused by the negligence of the defendant; that said Emmett Perry was without fault or negligence in the premises; and concludes with a description of the nature and extent of the injuries inflicted. In answer to the petition, the defendant filed a plea of the general issue. Subsequently the plaintiff amended his original petition, and, by way of amendment, alleged, in substance, as follows: That defendant was further negligent in that it ran said car along its track with said pile of lumber lying longitudinally along its track for a distance of 30 feet, and within 30 inches of said track, and thereby said obstruction so hid said car from the view of pedestrians, and so hid pedestrians from the view of those in charge of said car, and from the motorman and conductor of said car, that the persons in charge of said car, in running the same along the track when the accident occurred, could not run the same safely, and with all ordinary care and diligence towards the public, and towards petitioner and his infant child, without ringing the bell of said car, and running the same at a slow rate of speed, and much slower than 8 or 9 miles an hour. That at the time and place of said accident defendant was negligent in running said car at the rate of speed at which it was run along the line of said pile of lumber, and in not ringing the bell while running at the place of said accident and in approaching said place, and in not running slow at said time and place, so as to take all necessary and reasonable precaution against injury to your petitioner and his child and the public at said place, and in not exercising all ordinary and reasonable care and diligence in preventing said accident, and in permitting said obstructions to remain within 30 inches of its track, a distance of 40

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feet, for 3 weeks, whereby the track, and the approach of the same, were so obstructed that said defendant could not see pedestrians approaching said track, and they in turn could not see the car. That petitioner's child did not see the car, on account of the obstruction, in time to avoid the accident, and that defendant could, in the exercise of ordinary care and diligence, have seen petitioner's child in time to have stopped the car and alarmed him from the track by ringing the bell.

The cause coming on to be heard, the plaintiff introduced a number of witnesses in support of the allegations of his petition, the substance of which, except that which is descriptive of the nature and extent of the injuries and the suffering and effects produced thereby, which is not material, is as follows: The defendant owned and operated a line of track lying longitudinally in the center of Fourth street, in Macon, Ga., said street running north and south. Fourth street, including sidewalks, is from 45 to 50 feet wide, and at a point intermediate of its intersection with Elm and Boundary streets, which latter streets run parallel to each other and at right angles with Fourth street, a pile of lumber, belonging to and to be used by an abutting lot owner in erecting a building, was also lying longitudinally in the street, estimated to be 30 or 40 feet in length, and from 5 to 14 feet in height; most of the witnesses fixing its height at 5, and the father of the minor, who is the plaintiff, fixing its height at 14 feet. This pile of lumber was lying longitudinally with and just east of the railroad track. On the north end it lay about 5 feet from the track, and on the south end about 20 or 30 inches from the track. A portion of the lumber consisted of a pile of rafters framed together, on account of which, according to one of the witnesses, "there was a little vacant space; kind of stall like,—some of the lumber projecting over." At the point where the lumber was lying the street was straight and practically level. On Sunday afternoon, in or about March, 1893, this pile of lumber having then remained in the street something like two weeks, a number of persons were

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sitting on the porch of a dwelling house situated on the west side of Fourth street, almost opposite, but angling a little to the southwest of the pile of lumber. Their attention was suddenly attracted to the point where this lumber was lying by the turning or the throwing of brakes on the wheels of a car going southward, and just opposite the southern end of the pile of lumber, as well as by the immediate cries of the child. The car was stopped within a distance of 25 or 30 feet, and the plaintiff's child picked up from the eastern side of the track, with serious injuries inflicted. All of the witnesses concur in the statement that they heard no gong sounded on this occasion. None of the witnesses had seen or had their attention attracted by the presence of children around and about this pile of lumber prior to the accident, except one witness, who testified that the first thing that attracted her attention was the children playing behind the pile of lumber; that she then saw the car, which was coming by the lumber; that when she saw the car she did not then see the children, but knew they were behind the lumber. One witness, who was sitting on the porch, which was elevated above the street, testified that "a man five feet seven inches high I could see to his middle, if he had not been close up to the pile of lumber"; while the plaintiff testified: "I think the lumber was 12 or 14 feet high. If a man was standing on the sidewalk, a man sitting on Snipe's porch [the porch on which the witnesses who saw the accident were sitting] could see him, for Snipe's house is elevated. The lumber was between ten and fourteen feet high. I measured it. A five-foot man standing on the sidewalk might see the top of the car when it runs on the wire." Up to the time of the accident the children playing about the pile of lumber had made no noise, nor whooped and cried out, so as to attract the attention of the witnesses who saw the accident, and none of the witnesses saw the injured child until he had been struck by the car, except one who testified: "It was a short time after I saw the little boy when he was at the end of the pile

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of lumber, and the next time I saw the boy he was lying on the track. If the motorman had been standing on the front end of the car as it was moving, and had been looking straight ahead, I think he could have seen the little boy; but at that time he did not have time to stop the car, I know, because he was too near on the child. I could not say the car was going at a fast rate of speed. He could not stop the car. I don't suppose he could stop the car, or he would have done it. * * * Don't know how far the boy was in front of the car when I saw him. Just got a glimpse of the child, and the car passed. * * * I saw him at the edge of the lumber, and the car passed so quick that I did not see him any more. It looked like it was as quick as it could be done. * * * I saw him practically for an instant and then the accident occurred. * * * He was running when I saw him, but it was so quick I could not tell hardly how quick it was. * * * Guess he started across the track. Don't know whether he started across the track or by the side of the lumber. * * * He came in the direction of the track, and, as he made that start towards the track, he disappeared from my view and the collision occurred." Another witness testified: "If a boy had been playing on the north end of the pile of lumber, and run around from the corner, he would have been in thirty inches of the track, and two steps would have put him on the track or against the car." When the boy was picked up, he was lying on the same side of the track as the pile of lumber was situated, just above and about seven feet from the end of the lumber, and there was blood on the track between the end of the pile of lumber and the point where the boy was picked up, extending back about three feet from where the boy was lying. Some of the witnesses testified that the car was not running at an unusual rate of speed; some that it seemed to be running at schedule rate; some that it was running about the usual speed, eight or nine miles an hour; and some that it was running pretty fast. The evidence shows that the brakes were promptly applied; one witness, who was

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attracted by the noise of the brakes testifying: "It was a mighty short time after I looked up before the car stopped. I suppose the motorman stopped the car as soon as he could. * * * The motorman stopped the car as soon as the brakes would hold it, as far as I could see." Another testified: "The motorman was applying the brake according to the noise that I heard. * * * I cannot say whether the motorman was trying to stop the car or not when I first saw it, but, from the noise of the brakes on the wheels, I think he was trying to stop; from what I heard I say he was trying to stop it." It was shown that the child injured was between six and seven years of age.

The judgment of the court below granting a nonsuit in this case is sustained, not upon the theory that the person injured was guilty of such negligence as would prevent a recovery, but upon the theory that the defendant company was guilty of no negligence relative to the person injured which could authorize a recovery. Under the law of this state, when an injury is shown to have been inflicted by a railroad company, the presumption arises that such injury was negligently inflicted. Civ. Code, § 2321. And unless it be made to appear that the company, its agents and servants, have exercised all ordinary care and diligence, or that the injury was inflicted by the consent of the person injured, or caused by his own negligence, or that the person injured, by the exercise of ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, a recovery must result. In the present case, the injury was proven to have been inflicted. The presumption of negligence thereupon arose against the company, and the sole question is, was the trial judge authorized to say, as a logical inference, that the facts submitted in evidence showed that the defendant had exercised all ordinary and reasonable care and diligence, and therefore rebutted the presumption of negligence, or, conversely, that such facts showed no negligence on the part of the defendant in

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the infliction of the injury? In the management and operation of its line of railroad cars in the streets of the city of Macon, the law imposed upon the defendant the duty of exercising ordinary care and diligence to avoid the injury to pedestrians and travelers generally upon such streets, as well as to their property. Actionable negligence arises essentially from (1) a legal duty; (2) a breach of duty by failure to observe due care; and (3) such breach proximately causing damage. The question as to whether a legal duty existed to the party injured is one of law, and therefore for the court to pass upon. Whether there has been a breach of that duty, and whether it proximately caused damage to the plaintiff, are questions which depend upon circumstances, and therefore are usually to be determined by the jury. 16 Am. & Eng. Enc. Law, p. 463. If, being charged with such a duty, the defendant has omitted to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or has done something which a reasonable and prudent man would not have done, negligence is established. Generally, such a question is not to be decided by the judge, but, being a question of fact depending upon the various facts and circumstances attending the case, should be submitted to and decided by 12 men, drawn from various walks of life, who may apply to its solution their average judgment and experience. 2 Thomp. Tr. § 1662. Therefore, while in almost every case that arises there exists some element which makes the question one for the jury, this rule is not invariably applied. If, conceding to all the evidence the greatest probative force to which, according to the law of evidence, it is justly entitled, the case is such that reasonable men, unaffected by bias or prejudice, would be agreed concerning the absence or presence of due care, the judge would be quite justified in saying that the law deduced the conclusion accordingly. If the facts are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, then the judge

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should not be compelled to submit the question to the jury as one in dispute. Indeed, where there is no evidence of negligence, or so little that no reasonable man could from it find the fact of negligence, it is error to submit the matter to the jury, but a nonsuit should be ordered by the court. The case should not go to the jury where fair-minded men would not differ as to whether the inference of negligence should be drawn from the facts, taken most strongly against the defendant. 2 Thomp. Tr. § 1665 *et seq.*; 16 Am. & Eng. Enc. Law, pp. 466, 467; Cooley, Torts (2d. Ed.) 804. It is upon this principle that courts have been warranted in declaring that a failure to look and listen on approaching a railroad is negligence; that falling asleep upon or walking upon a railroad track or trestle is negligence; that attempting to cross a railroad immediately in front of a moving train is negligence; and it is upon this principle that the law of inevitable or unavoidable accident must rest.

For it must be remembered that negligence is not a fact which is the subject of direct proof, but an inference from facts put in evidence. As a matter of judicial law, no court could say that this act or that act constituted negligence, unless there was a statute declaring that such act should be treated as negligent; for otherwise negligence is always a logical inference, to be drawn or deduced from all the circumstances of the case. Whart. Law Neg. (2d. Ed.) § 420 *et seq.* Courts must take notice of that which is matter of common knowledge and experience, and when the plaintiff's case fails to disclose any act of negligence, when judged in the light of such knowledge and experience, he shows no right to a recovery. Gaynor v. Railway Co., 100 Mass. 208. There is a line of demarkation between injuries inflicted under circumstances which impute negligence and injuries inflicted under circumstances which all reasonable minds at once fix as the result of unavoidable accident. There must be circumstances under which a court may say, as a logical inference, that a duty imposed has been fully discharged. So,

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also, there must be circumstances under which a court may say that the duty imposed did not involve the taking of this or that precaution. There must be cases in which human foresight, in the exercise of ordinary care and prudence, ceases to be responsible, and injuries resulting from a pursuit of lawful business deemed accidental. In Shear. & R. Neg. § 56, the rule is stated to be that "when the facts are clearly settled, and the course which common prudence dictated can be clearly discerned, the court should decide the question as a matter of law," citing *Beisiegel v. Railroad Co.*, 40 N. Y. 9; *Stublely v. Railroad Co.*, L. R. 1 Exch. 13; *Crafter v. Railroad Co.*, L. R. 1 C. P. 300.

In the present case the acts of negligence relied upon for a recovery were (1) that the car was running at an unusual and illegal rate of speed; and (2) that in approaching the pile of lumber which had been permitted to remain in the street for a considerable length of time, and which was very near the track of the defendant, no gong was sounded nor other notice given of the approach of the car. The evidence, however, does not show that the car was being run at an unusual rate of speed, nor was it contended that the rate of speed at which it was running was beyond the limit authorized by the municipal ordinance, nor was it claimed or shown that there was any law or ordinance which required the gong to be sounded on approaching an obstruction in the street. The evidence shows that the obstruction, being a pile of lumber which had been placed in the street by private parties, who were engaged in erecting a building near by, was lying in the street longitudinally with and very near the track, at a point intermediate of its intersection with other streets. At the point where the obstruction was lying the track was straight, and there is no evidence tending to show that the motorman was not on the lookout. On the contrary, it appears that everything possible was done to prevent the injury after the child came from behind the pile of lumber to a point where it was possible for him to be

Same—Obstruction Near Track—
Failure to Signal.

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seen by the motorman. It appears that the child suddenly came on or near the track from behind the pile of lumber, where it was impossible for him to be seen, and stepped immediately in front of the car, or ran against the front portion of it. The only witness who saw the child prior to the accident testified, in effect, that he got a mere glimpse of him as he came from behind the pile of lumber, and in an instant the moving car had obstructed the view. There was no evidence that children were in the habit of playing at this particular point, nor that on this particular occasion the children were making any noise, nor was any other fact or circumstance shown from which notice to the motorman that the children were behind the pile of lumber could be inferred. The injury occurred in the daytime, and the evidence is undisputed that the motorman could not possibly have seen the child in time to prevent the accident. The question therefore, is practically narrowed down to whether the motorman was negligent in failing to sound the gong in approaching this obstruction.

It is undoubtedly the duty of the motorman, in propelling a car through the public streets, to notice the presence of other vehicles and pedestrians ahead of his car, and at all times be watchful to see that the way is clear; and where he has reason to apprehend danger, or should in the exercise of ordinary care become cognizant of danger, he should regulate the speed of his car so that it may be quickly stopped should occasion require it. *Humbird v. Railway Co.* (Mo. Sup.) 19 S. W. 69. If a person be seen upon the track, who is apparently capable of taking care of himself, the motorman may assume that he will leave the track before the car reaches him, and this presumption may be indulged so long as the danger of injuring him does not become imminent, but no longer. But he cannot act upon that presumption with reference to a child too young to appreciate its danger. *Railroad Co. v. Hewitt*, 67 Tex. 473, 474, 480, 3 S. W. 705. Thus, where a child is seen, or in the exercise of ordinary

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care could have been seen, running towards, near, or upon the track, it is the duty of the motorman to take such precautions as will prevent a collision. *Shenners v. Railway Co.*, 78 Wis. 382, 47 N. W. 622; *Mallard v. Railroad Co.* (Com. Pl.) 7 N. Y. Supp. 666; *Ihl v. Railroad Co.*, 47 N. Y. 317; *Strutzel v. Railway Co.* (Minn.) 50 N. W. 690. The degree of diligence required is proportionate to the duty imposed, and the degree of negligence imputed corresponds to the degree of diligence exacted.

If, to a reasonable mind, viewed, not from results, but from the situation and surroundings as they existed at the time of the act which produced the injurious effects, there was no impending danger, no diligence could be exacted. "Ordinary care" is a relative term, the standard of which increases or diminishes accordingly as the danger greater or less. If the happening of an event is beyond human anticipation, no one would be negligent in failing to take precautions against that event. Accordingly, if a child suddenly and unexpectedly appear in the vicinity of a railroad track, under such circumstances that, by the exercise of proper caution and attention, the motorman could not have discovered his presence in time to avert an accident, the company will not be liable. Thus, in the case of *Kennedy v. Railway Co.*, 43 Mo. App. 1, where it appeared that a young girl was run over by one of the defendant's street cars at a crossing on Broadway, in the city of St. Louis, and it was shown by the evidence that an ice wagon was on the east side of the street, and the girl ran behind it, and upon the defendant's track immediately in front of the mules; that there were other wagons near the point of accident when it occurred; that the driver was looking towards the river (to the east); and that the driver stopped the car as quick as he possibly could after the child came upon the track and screamed,—the court held that these facts showed no negligence on the part of the driver, nor any facts from which the jury could reasonably infer such negligence; that the injury was the result of an accident,

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so far as the defendant was concerned ; and therefore the plaintiff was not entitled to recover. So, also, in the case of *Baker v. Railroad Co.* (Sup.) 16 N. Y. Supp. 319, where it appeared that a child eight years old started across the street immediately behind an up-town car, near the middle of a block where there was no crossing ; that the horses of a down-town car came immediately in front of her as she got between the tracks, and that the driver, on seeing her, pulled his horses away from her, so that she was struck and knocked down by the flank of one of them, and injured by the car wheel passing over her feet ; that the driver had his face turned away from the child, and that his attention was first attracted to her by the horse's collar striking her,—it was held that, as the child's crossing immediately behind the up-town car was not to be anticipated, the action of the driver was, at the worst, an error of judgment, and that the evidence would not sustain a finding of negligence. In the present case the car, as we have said, was not being propelled at an illegal, or, indeed, unusual, rate of speed ; the track was straight and clear ; it was in the daytime ; no children were in the habit of playing about the pile of lumber ; on this occasion they were so noiseless that persons sitting on a porch just opposite were not attracted by them ; there was nothing to put the motor-man on notice that they were present ; and the conclusion is inevitable that the injury was the result of accident or misfortune. Judgment affirmed.

ATKINSON, J. (dissenting). When the tracks of a street-railway company are laid longitudinally in a public street of a city, and obstructions are placed in such street in such a position as to be alongside of, and in such immediate proximity to, its track as that a car, being run along such track, is obscured from the vision of one approaching from the direction of such obstruction, and that as a person so approaching is not visible to the persons operating such car, until he is almost in immediate collision with it, and it appears that, not-

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withstanding the location of such obstruction, one of the cars of the company, running at a high, though not unusual, rate of speed, the persons operating the same giving no warning of its approach, collided with a person suddenly stepping from behind such obstruction upon the track, and injured him, the question whether the agents of the company and the person injured, in view of the relative situations of track and obstructions, were each or either of them in the exercise of all ordinary and reasonable diligence was one of fact, and should have been submitted to the jury, and the grant of a nonsuit, in an action instituted by the person injured against the street-railway company for injuries sustained in consequence of a collision occurring under such circumstances was error, and particularly is this true where it appears that the person injured was an infant of such tender years as to render doubtful the question whether it could be held to any degree of diligence in the matter of taking precautions for its own safety.

SOUTH COVINGTON C. ST. RY. CO.

v.

PELZER.

(*Court of Appeals of Kentucky, March 13, 1897.*)

Injury to Person on Street Car Track—Admissibility of Evidence.—In an action to recover damages for an injury alleged to have been sustained by plaintiff while driving a vehicle across defendant's track; and to have been caused by the negligence of the car driver, defendant's witnesses testified as to an indentation on such car made by one of the wheels on plaintiff's wagon. *Held*, that evidence for plaintiff that a car of the same number and description, and running over the same lines, was examined, and no such indentation was found upon it was admissible, though such examination was made more than a year after the accident.

Collision With Vehicles—Negligence.*—In such action it was proper to instruct that if the injuries were the result of defendant's car running into plaintiff's wagon while it was being driven off the car track, the jury should find for plaintiff, the car driver having had ample time to prevent the collision by stopping his car.

*See note at end of case.

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Contributory Negligence—Same.—And it was also proper to instruct that if the collision was caused by plaintiff's wagon being driven into contact with the car after the wagon had passed over the track, the jury should find for defendant.

Abstract Propositions of Law—Instructions.—Instructions embracing mere abstract propositions of law, not based upon any evidence in the case, were properly refused.

APPEAL by defendant from Campbell county circuit court. *Affirmed.*

Simrall & Galvin, for appellant.

Horace W. Root and *R. C. Taylor*, for appellee.

NOTE.

Street Railways—Collisions with Vehicles—Negligence.—See 1 Am. & Eng. R. Cas., N. S., *note* 259 *et seq.* See *White v. Worcester Consol. St. R. Co.*, 6 Am. & Eng. R. Cas., N. S., p. 110 & *note*.

The driver of a street car, who sees a carriage crossing the tracks in front of him at a walk, is not justified in going ahead, trusting that the carriage driver will get out of his way. The fact that the carriage driver can turn in any direction, and thus avoid the car, which is confined to its tracks, does not relieve the car driver of the duty to use ordinary care to avoid collision. *Gallagher v. Coney Island, etc.*, R. Co., 4 N. Y. Supp. 870; *Read v. Chicago West Div. R. Co.*, 8 Ill. App. 517; *Lamb v. St. Louis, etc.*, R. Co., 33 Mo. App. 489. See also *Liddy v. St. Louis R. Co.*, 40 Mo. 506.

In *Swain v. Fourteenth St. R. Co.*, 93 Cal. 179, a police officer with his patrol wagon was driving along the track carrying an injured man. He saw the car coming and halloed to the driver and tried to turn out, but had to do so slowly on account of the sick man. The car company was held guilty of negligence in causing the collision, since, if the driver had been looking ahead at all, it would have been avoided. See also *Quinn v. Atlantic Ave. R. Co.*, 12 N. Y. Supp. 223 (question for the jury as to negligence of both parties); *Berke v. Twenty-third St. R. Co. (Supreme Ct.)*, 4 N. Y. Supp. 905; *Coughtry v. Willamette St. R. Co.*, 21 Oregon 245; (team frightened by motor—horses "danced" on the track in front of approaching motor—recovery not allowed); *Philadelphia Traction Co. v. Bernheimer*, 125 Pa. St. 615; 38 Am. & Eng. R. Cas. 487 (very similar case).

In *Rascher v. East Detroit, etc. R. Co. (Mich 1892)*, 51 N. W. Rep. 463, the plaintiff was driving along the track at night and was run into by an electric car. The first warning of its approach which he had was the glimmer of lights inside and then it was too late to turn out in time. Had there been a headlight he could have seen the car approaching at the distance of more than a mile. It was held that the plaintiff was not negligent in being on the track and that the other questions of negligence should be submitted to the jury. In such a case evidence is admissible that the public were in the habit of driving on the track, as bearing upon the question of defendant's negligence in running a car without lights. See generally *Lyman*

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v. Union R. Co., 114 Mass. 83, as to the duty of the driver of the horse car when checking speed upon meeting a vehicle, to calculate for the sliding of the approaching wheel in the groove of the rail upon turning out.

ALABAMA G. S. R. Co.

v.

BURGESS.

(*Supreme Court of Alabama, May 20, 1897.*)

Injury to Trespasser on Track*—Wanton Negligence—Sufficiency of Complaint.—In an action against a railroad company for personal injuries, a count of the declaration setting out wanton negligence on the part of defendant as the cause of such injuries, is not demurrable because it also shows that plaintiff was a trespasser on defendant's track when injured.

Wanton or Wilful Negligence—Definition.—Wanton or willful negligence on the part of railroad employees in not avoiding the infliction of such injuries is a failure on their part to make what they know at the time to be the proper preventive effort after discovery of the peril.

Same—Findings.*—And when the complaint merely alleges that such injuries were caused by failure on the part of defendant's engineer to use due and reasonable care to avoid injuring plaintiff after discovery of his peril, only simple negligence is charged; and in such action it is not competent for the jury to find defendant guilty of wanton or willful negligence.

Negligence after Discovery of Peril—Admissibility of Evidence.—Plaintiff's father was permitted to testify to an experiment made by him and others about a month after the injury to ascertain whether plaintiff could have been seen by defendant's engineer in time to avoid the injury.

Held, that such evidence does not furnish, or aid in furnishing, a safe guide to the jury, and should not have been admitted.

Witnesses—Evidence of Interest.—It was competent for defendant to show by cross-examination of plaintiff's father, that such witness was plaintiff in an action pending against defendant for the killing of plaintiff's minor sister, who was with him on defendant's track at the time of his injury.

Evidence—Conclusion of Fact.—A passenger on such train stated that he knew that the brake was put on, because of the sudden stopping of the train after the whistle was blown. *Held*, that such statement was the statement of a mere conclusion, and was properly excluded.

Negligence—Conflicting Evidence—Question for Jury.—Where there was evidence in such case tending to show that defendant's engineer saw plaintiff on the track in time to prevent the injury, but also evidence tending to show the exercise of due care by the

*Duty of Railroad Employees to Trespassers on Track.—See 8 Am. & Eng. R. Cas., N. S., 677, *note*.

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engineer at such time, the general affirmative charge in behalf of defendant was properly refused.

Pain an Element of Damages—Instructions.—In such action the jury was properly charged "that the impossibility of definitely measuring the damages by a money standard, when pain is claimed as an element of damages, is no ground for denying pecuniary relief."

Contributory Negligence—When Available.—Contributory negligence not having been pleaded in such action, the fact that plaintiff was negligent, or a trespasser, when injured would not prevent a recovery.

APPEAL by defendant from Etowah county circuit court. *Reversed and remanded.*

Goodhue & Sibert, for appellant.

Dortch & Martin, for appellee.

HEAD, J., in delivering the opinion of the court, said: "But, upon examination of several of our recent rulings, the principle will be found to have been declared that, to constitute wantonness or willfulness on the part of the servants, in their omissions to use proper preventive effort after discovery of the peril, they must have been conscious, at the time, that they were omitting to use the means at hand which the circumstances reasonably required to avert the injury. The omissions may have resulted from the want of skill, or other unintentional causes, which, in law, would have constituted negligence, or a want of due care, yet exculpating the servants from that conscious or intentional wrong which is equal to wantonness or willfulness. *Railway Co. v. Lee*, 92 Ala. 262, 9 South. 230; *Railroad Co. v. Markee*, 103 Ala. 160, 15 South. 511. This count only charges the failure to exercise due and reasonable care, after discovery of the peril, which, in view of the principle above stated, is no more than a charge of negligence. The count is good, as one charging negligence merely. It must be observed, however, that under the count as framed proof must be confined to the inquiry whether there was a failure to exercise due and reasonable care, after discovery of the plaintiff's peril; that being the character of negligence charged."

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EVANS

v.

LAKE ERIE & W. R. Co.

(*Circuit Court D. Indiana, Feb. 17, 1897.*)

Injury to Person on Track—Contributory Negligence—Federal Courts.—Contributory negligence is a matter of defense in the federal courts; and an answer containing a general denial, and alleging that the proximate cause of plaintiff's injury was contributory negligence on her part is not demurrable.

Pleading—Imputable Negligence*—Surplusage.—But a paragraph of such answer setting up as defense the negligence of the driver of the vehicle in which plaintiff was attempting to cross defendant's track when injured, plaintiff not having been chargeable with notice of any incompetency on the part of the driver; and again setting up contributory negligence, which had been alleged in a preceding paragraph, is demurrable, and may, on motion, be stricken out as surplusage.

Holstein & Barrett and *Emerson McGriff*, for plaintiffs.

W. E. Hackedorn and *John B. Cockrum*, for defendants.

BAKER, D. J., in delivering the opinion of the court, said: "In so far as this paragraph sets up the negligence of Frank Moore, it is immaterial, because it is settled by the decisions of the supreme court of this state and of the United States that the negligence of the driver is not imputable to the passenger riding with him. *Town of Knightstown v. Musgrove*, 116 Ind. 121, 18 N. E. 452; *Miller v. Railway Co.*, 128 Ind. 97, 27 N. E. 339; *Railway Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476; *Little v. Hackett*, 116 U. S. 366. 6 Sup. Ct. 391."

NOTES.

DOCTRINE OF THOROGOOD vs. BRYAN.

Whether Negligence of Carrier Is Imputable to Passenger.—The contributory negligence of a carrier should be imputed to a passenger. *So held*, where a passenger in an omnibus was injured by the joint negligence of the driver of another omnibus, and that of the one in which he rode; the reason being given that the passenger voluntarily in the carriage was identified therewith to such a degree that the want of care on the part of the driver would bar his action; and that he was in the position of a master and responsible for the acts of his servants or agents. *Thorogood v. Bryan*, 8 C. B. 115.—*Explained and followed* in *Armstrong v. Lancashire & Y. R. Co.*,

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L. R. 10 Ex. 47. *Not followed* in *Little v. Hackett*, 116 U. S. 366, 54 Am. Rep. 135. *Overruled* in *The Bernina*, L. R. 12 P. D. 58, which is affirmed in L. R. 13 App. Cas. 1.

Plaintiff, a passenger on a train, was injured, as the jury found, by the joint negligence of those in charge of the train on which he was a passenger and those in charge of the defendant's train. *Held*, that plaintiff was so far identified with the train on which he rode that he could not recover. *Armstrong v. Lancashire & Y. R. Co.*, L. R. 10 Ex. 47.—*Following* *Thorogood v. Bryan*, 8 C. B. 115.—*Bridge v. Grand Junction R. Co.*, 3 M. & W. 244.

To what Extent Approved and Followed.—If a person who is driving a wagon and team, and, as such driver, has control of the movements of the wagon and fails to exercise proper care, skill, or watchfulness, and thereby aids in causing an accident, whereby the occupants of the wagon are injured, such negligence on the part of the driver is the negligence of the injured occupants, and defeats their right of recovery. *So held*, where plaintiff, as administrator, sued for the death of his wife and two children who were in a wagon that he was driving and which collided with a train. *Morris v. Chicago, M. & St. P. R. Co.*, 26 Fed. Rep. 22.

Where the plaintiff voluntarily rides in a private carriage with others, one of whom drives, the negligence of the driver contributing to an injury to plaintiff is imputed to the latter so as to defeat a recovery. *Otis v. Janesville*, 47 Wis. 422; *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558.

The rule which imputes the negligence of the driver of a private conveyance to one who rides in it, so as to defeat a recovery, does not apply to passengers in railway cars or steamboats, even though they have chartered the conveyance. *Cuddy v. Horn*, 46 Mich. 596, 41 Am. Rep. 178.

DOCTRINE IN THE UNITED STATES.

Thorogood vs. Bryan Denied—Alabama.—The concurring negligence of two railway companies whereby a collision is brought about, and a passenger on one of the cars of the street railway company is injured, may create a joint and several liability on the part of the two companies, but it does not exonerate either of them as against the plaintiff. *Georgia Pac. R. Co. v. Hughes*, 39 Am. & Eng. R. Cas. 674, 87 Ala. 610, 6 So. Rep. 413.

The fact that plaintiff and the driver of the vehicle were both firemen in the employment of the city, and were going to a fire in answer to an alarm, as required by their common business and duty, does not take the case out of the principle above stated, nor render the plaintiff liable for the careless or reckless driving of the driver. *Elyton Land Co. v. Mingea*, 43 Am. & Eng. R. Cas. 309, 89 Ala. 521, 7 So. Rep. 666.

Georgia.—If the plaintiff herself was free from negligence, and her injury was due to the concurrent negligence of the railroad company and the person with whom she was riding in a wagon, he not being her servant, and it not appearing that she was the owner of the horse and wagon, or that she had any agency or concern in procuring or in driving the same, and nothing appearing which tends to show that she was aware of any incompetency in the driver, the company is liable to her for all the damages consequent upon the injury. *Metropolitan St. R. Co. v. Powell*, 89 Ga. 601, 16 S. E. Rep. 118; *East Tenn. V. & G. R. Co. v. Markens*, 83 Ga. 60, 13 S. E. Rep. 855.

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But if the negligence of the driver was the sole cause and the real cause of the collision she cannot recover, because the company not being negligent, no action would lie. *East Tenn. V. & G. R. Co. v. Markens*, 88 Ga. 60, 13 S. E. Rep. 855.

A female passenger in a public hack is under no duty to supervise the driver at a public crossing, nor to look or listen for approaching trains, unless she has some reason to distrust the diligence of the driver himself in respect to these matters. *East Tenn. V. & G. R. Co. v. Markens*, 88 Ga. 60, 13 S. E. Rep. 855.

Illinois.—Where a railway passenger is injured by a collision of his train and the train of another company, through the mutual negligence of both, and he has no contract relations with such other company, he may maintain an action against either company; or if he be killed his representative may maintain such action. *Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791; *Union R. & T. Co. v. Shacklett*, 19 Ill. App. 145.

Indiana.—If a man is riding with another, and is injured by a collision occurring through the concurrent negligence of the driver of the vehicle and the servants of a railroad train engaged in running it, he may recover, notwithstanding the contributory negligence of the driver of the vehicle in which he was riding. *Terre Haute & I. R. Co. v. McMurray*, 22 Am. & Eng. R. Cas. 371, 98 Ind. 358, 49 Am. Rep. 752; *Michigan City v. Boeckling*, 122 Ind. 39, 23 N. E. Rep. 518.

Iowa.—A passenger in a hired conveyance is not precluded from recovering for injuries received at a railway crossing where the accident was due to the negligent action of the driver furnished by the owner of the conveyance. The negligence of the driver prevents recovery only when he is under the control or direction of the party injured. *Larkin v. Burlington, C. R. & N. R. Co.*, 85 Iowa 492, 52 N. W. Rep. 480.

Plaintiff was driving with three of his neighbors, with a team which did not belong to any of the parties, but was under the control of one of the neighbors. Through the negligence of one of the party, who was driving, plaintiff was injured by a train in crossing the track. *Held*, that the negligence of the driver would defeat an action by plaintiff for the injury received. *Payne v. Chicago, R. I. & P. R. Co.*, 39 Iowa 523, 9 Am. Ry. Rep. 176.

If the driver and the plaintiff were at the time of the accident engaged in the pursuit of a common purpose, the negligence of the driver might be imputed to plaintiff; and whether they were so engaged was a question for the jury under the evidence. *Nesbit v. Garner*, 75 Iowa 314, 39 N. W. Rep. 516.

The negligence of plaintiff's son, eleven years old, who was on a wagon driven by his father, and saw a car coming, but failed to notify his father of the fact, could not be imputed to the father. *Watson v. Wabash, St. L. & P. R. Co.*, 19 Am. & Eng. R. Cas. 114, 66 Iowa 164, 23 N. W. Rep. 380.

But see *Slater v. Burlington, C. R. & N. R. Co.*, 71 Iowa 209, 32 N. W. Rep. 264, in which case the plaintiff, a boy of about twelve years, was riding with his mother in a carriage driven by his mother's servant. While attempting to cross the defendant's track the carriage was struck by a passing locomotive and the plaintiff was seriously injured. The driver was careless in not stopping at a proper place and looking for an approaching train, and the mother was careless in not requiring the

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driver so to stop and look. *Held*, that this carelessness must be imputed to the plaintiff, and that a judgment in his favor must be reversed, although the train was running at a dangerous rate of speed, and did not give warning of its approach.

Kentucky.—Where the life of a passenger in a street railway car is lost by the concurrent negligence of the driver of the car and other persons, such negligence of the driver is no defense in an action against the other persons, such driver not being the agent or servant of the decedent, nor subject to his government or control. *Louisville, C. & L. R. Co. v. Case*, 9 Bush. (Ky.) 728.—*Followed in Noyes v. Boscawen*, 64 N. H. 361.

Louisiana.—The doctrine that a passenger in a public conveyance is in some way identified with the owner or the driver of it so that he cannot recover of the owner of another public conveyance for injuries caused by a collision of the two, when he has exercised no control over the conduct of the driver of the vehicle in which he is riding, is unjust, illogical, and indefensible. *Holzap v. New Orleans & C. R. Co.*, 38 La. Ann. 185. See also *Westerfield v. Levis*, 43 La. Ann. 63, 9 So. Rep. 52.

Maine.—The negligence of a driver is not imputed to a passenger carried gratuitously, who has no control over the driver. *State v. Boston & M. R. Co.*, 35 Am. & Eng. R. Cas. 356, 80 Me. 430, 15 Atl. Rep. 36.

Maryland.—The contributory negligence of a driver of a public or private vehicle not owned or controlled by the passenger, and who is himself without fault, will not constitute a bar to the right of the passenger to recover against a railroad company for injuries received by a collision of its trains with the vehicle. *Philadelphia, W. & B. R. Co. v. Hogeland*, 66 Md. 149, 7 Atl. Rep. 105.

Massachusetts.—Where a railroad passenger sues his company for a personal injury sustained through its negligence and the negligence of those in charge of another train, which was running on the same track, it is no defense that the negligence of the other train contributed to the injury, although such other train acted independently of defendant. *Eaton v. Boston & L. R. Co.*, 11 Allen (Mass.) 500.

Michigan.—The rule by which one who rides in a private conveyance is presumed to control or be identified with the driver and to have no right of action for any injury done to him by a collision caused by the driver's negligence, cannot apply to passengers in public conveyances, such as railway cars or steamboats, even though they have chartered the conveyance. *Cuddy v. Horn*, 46 Mich. 596, 10 N. W. Rep. 32.

Minnesota.—In an action against two companies for the killing of a passenger in a train of one of them, in a collision with a train of the other, a complaint alleging negligence in the operation of both trains is sufficient. The negligence of the carrier in whose train deceased was a passenger is not imputable to him. *Flaherty v. Minneapolis & St. L. R. Co.*, 39 Minn. 328, 40 N. W. Rep. 160, 1 L. R. A. 680.

Mississippi.—The contributory negligence of a driver in venturing upon a crossing before an approaching train, whereby his vehicle is struck, is not imputable to a temporary occupant of the vehicle, who is being driven in it by a mere invitation of its owner, and who

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has no control over the driver, and no reason to believe that he is imprudent. *Alabama & V. R. Co. v. Davis*, 69 Miss. 444, 13 So. Rep. 693.

Missouri.—A passenger on the vehicle of a common carrier, who is injured by the concurrent negligence of the driver and a third person, is not precluded from recovery against the latter because of the concurring negligence of the driver. *Becke v. Missouri Pac. R. Co.*, 45 Am. & Eng. R. Cas. 174, 102 Mo. 544, 13 S. W. Rep. 1053.

The negligence of the driver of a vehicle, he not being in the employment or under the control of the person injured while riding thereon, cannot be imputed to the latter. *Dickson v. Missouri Pac. R. Co.*, 104 Mo. 491, 16 S. W. Rep. 381.

New Hampshire.—The negligence of the driver of the carriage in which plaintiff was riding at the time of the injury, is no defense to an action against a town for damages from a defective highway, by a passenger guilty of no personal negligence and having no control over the driver. *Noyes v. Boscawen*, 64 N. H. 361, 10 Atl. Rep. 690.

New Jersey.—The hiring of a coach and driver for a particular journey does not create the relation of master and servant, so as to impute the driver's negligence to the hirer. *New York, L. E. & W. R. Co. v. Steinbrenner*, 23 Am. & Eng. R. Cas. 330, 47 N. J. L. 161.

New York.—One riding in a wagon, which is driven by another over whom he has no control, is not chargeable with the negligence of the latter in negligently causing a collision with a train at a crossing. *Cosgrove v. New York C. & H. R. R. Co.*, 13 Hun (N. Y.) 329; *see* 87 N. Y. 88.—*Reviewing* *Johnson v. Hudson River R. Co.*, 20 N. Y. 73; *Wilds v. Hudson River R. Co.*, 24 N. Y. 430; *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Masterson v. New York C. & H. R. R. Co.*, 3 Am. & Eng. R. Cas. 408, 84 N. Y. 247, 38 Am. Rep. 510; *Robinson v. New York C. & H. R. R. Co.*, 66 N. Y. 11; *affirming* 65 Barb. 146; *Bennett v. New York C. & H. R. R. Co.*, 40 N. Y. S. R. 948, 16 N. Y. Sup. 765; *affirmed in* 133 N. Y. 563, *mem.*, 30 N. E. Rep. 1149, 44 N. Y. S. R. 930; *McCaffrey v. Delaware & H. Canal Co.*, 41 N. Y. S. R. 221, 62 Hun 618, 16 N. Y. Supp. 495; *affirmed in* 137 N. Y. 568, *mem.*, 33 N. E. Rep. 339, *mem.*, 50 N. Y. S. R. 934.

Where a lady is a mere passenger with the driver of a horse, his negligence in causing her to be injured in passing a railroad is not imputable to her, though the driver is her father. *Phillips v. New York C. & H. R. R. Co.*, 127 N. Y. 657, *mem.*, 3 Silv. App. 467, 27 N. E. Rep. 978, 38 N. Y. S. R. 675; *affirming* 53 Hun 634, 25 N. Y. S. R. 91, 3 Silv. Sup. Ct. 5, 6 N. Y. Supp. 621.

Plaintiff, a female, was driving with a lady who employed her, the latter being on the front seat and driving, while plaintiff was on the back seat in charge of an infant. *Held*, under such circumstances, that she was not chargeable with the negligence of her employer in contributing to an injury while passing a railroad. *Crawford v. Delaware L. & W. R. Co.*, 13 N. Y. S. R. 298.

Ohio.—In an action for personal injury against a defendant whose negligence directly and proximately concurred with the negligence of the railroad company in producing the injury, the concurrent negligence of the company cannot be imputed to plaintiff. *Covington Transfer Co. v. Kelly*, 3 Am. & Eng. R. Cas. 335, 36 Ohio St. 86, 38 Am. Rep. 558.

Pennsylvania.—The negligence of the driver of a vehicle, where-

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by it collides with a railroad train at a highway crossing, cannot be imputed to one whom he has invited to ride with him, merely as an act of kindness, and whom he carries without any compensation. *Dean v. Pennsylvania R. Co.*, 39 Am. & Eng. R. Cas. 697, 129 Pa. St. 514, 18 Atl. Rep. 718.

Texas.—The negligence of another person not participated in by the plaintiff will not be attributed to him, unless he has some right of control over such person, or they are on terms of equality, engaged in a joint enterprise. *Garteiser v. Galveston, H. & S. A. R. Co.*, 2 Tex. Civ. App. 230, 21 S. W. Rep. 631.

Virginia.—Where, by the concurrent negligence of a carrier and a third person, a passenger is injured, the negligence of the former cannot be attributed to the passenger so as to prevent him from recovering damages of the third person. *New York P. & N. R. Co. v. Cooper*, 37 Am. & Eng. R. Cas. 33, 85 Va. 939, 9 S. E. Rep. 321.

Federal Decisions.—Where a person rides in a public hack and exercises no control over the driver, except telling him the place to which he wishes to be driven, he is not chargeable with the negligence of such driver, so as to prevent him from recovering for an injury by colliding with a train, caused both by the negligence of such driver and those in charge of the train. *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. Rep. 391; *Missouri Pac. R. Co. v. Texas Pac. R. Co.*, 41 Fed. Rep. 316; *Union Pac. R. Co. v. Lapsley*, 51 Fed. Rep. 174, 4 U. S. App. 542, 2 C. C. A. 149.

CHICAGO & E. I. R. Co.

v.

CHANCELLOR.

(Supreme Court of Illinois, Jan. 19, 1897.)

Killing Person on Track—Statements of Intending Passenger—Res Gestæ.—In an action for damages for the killing of plaintiff's intestate by defendant's locomotive while she was, it was alleged, attempting to board defendant's train as a passenger, statements of an intention to become a passenger made by deceased an hour before the injury, while at home and engaged in household duties, were improperly admitted, not being part of the *res gestæ*.

Contributory Negligence—Evidence.—Plaintiff's intestate had been standing out-side defendant's station on the platform for about 30 minutes when she attempted to cross the nearest track, there being a passenger train on the next track which had been stationary for several minutes, and was killed by a freight train, which had been started near the platform after the usual and proper signals had been given, and was moving slowly in the direction of deceased, and was only about 12 feet from her when she made such attempt. *Held*, that the jury should have been instructed to find for defendant, as requested.

APPEAL by defendant from First district appellate court. *Reversed and Remanded.*

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W. H. Lyford, W. J. Calhoun, and J. B. Nann, for appellant.

Thorton & Chancellor, for appellee.

PHILLIPS, J., in delivering the opinion of the court, said:

“One of the cases relied on to support the contention of appellee that this evidence was admissible as part of the *res gestæ* is *Railway Co. v. Herrick*, 29 N. E. 1052, 49 Ohio St. 25. In that case a witness was permitted to testify that on the morning defendant in error left his hotel he said to witness, who was a clerk, that he was going to Collins. He was injured while on his way to the train that ran to Collins. In its opinion the court says: ‘Was his declaration that he was going to Collins competent evidence of that fact? That depends on whether the declaration was contemporaneous with and explanatory of the act of departure. One departing from home may have in view any conceivable place, or any conceivable purpose, as his destination or object. The act of departure is thus in itself of the most ambiguous character. It does not afford the slightest clue to the object of the journey. It is natural and usual, according to the natural experience of mankind, that the party should say something respecting his departure of an explanatory character. Declarations thus made are part of the act itself.’ Where the evidence shows the party is about to start on a journey, from common experience we know it is usual and natural that something is said by the party relating to the departure, and of a character indicative or explanatory. For such declarations to be admissible in evidence as part of the *res gestæ*, they must be made in connection with an act proven, as in the case above cited.”

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CONSOLIDATED TRACTION CO.

v.

KNOTH.

(Court of Errors and Appeals of New Jersey, March 1, 1897.)

Injury to Driver of Vehicle on Street Car Track—Negligence—Question for Jury.—In an action against a street car company by a person who was injured while driving a vehicle across its track, there was evidence tending to show contributory negligence, and evidence tending to show negligence on the part of defendant, but on both points the evidence was conflicting. *Held*, that the case was properly submitted to the jury.

Error by defendant to Essex county circuit court.
Affirmed.

Joseph Coult, for plaintiff in error.

Samuel Kalisch, for defendant in error.

ROSEBERRY'S ADMR.

v.

NEWPORT NEWS & M. V. R. CO.

(Court of Appeals of Kentucky, March 5, 1897.)

Death of Person on Railroad Track—Sufficiency of Complaint—Limitations.—In an action to recover damages for the death of plaintiff's intestate, the petition alleged that it resulted from defendant's "willful neglect"; but this charge was withdrawn and the charge of gross negligence was substituted by amendment. *Held*, that the amendment did not set up a different cause of action, but simply alleged a different degree of negligence; and the statute of limitations did not apply.

Contributory Negligence.—Plaintiff's intestate went upon the tracks of defendant and took his seat thereon, behind a curve in the road, in broad daylight; and within less than 15 minutes after he had been warned of the danger of such conduct was killed by a train, which could not have been stopped in time to avoid the accident. *Held*, that defendant was not liable on account of such accident.

Evidence—Res Gestæ.—In such action plaintiff offered to prove that the conductor on such train stated, within fifteen minutes after the accident, with the crowd standing around discussing it, that the killing of deceased was uncalled for, and was caused by the malicious action of the engineer in cutting off the air brake so that he (the witness) could not control the train. *Held*, that such statement was not part of the *res gestæ*, and the evidence was hearsay, and properly excluded.

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Appeal by plaintiff from Carter county, circuit court.
Affirmed.

James Andrew Scott, for appellant.

John T. Shelby, for appellee.

BURNAM J., in delivering the opinion of the court, said: "It is insisted by counsel for appellee that as the death of Roseberry occurred in August, 1891, the cause of action is regulated by chapter 57 of the General Statutes, and, as the original petition charged willful neglect, that a general demurrer should have been sustained to the petition, as it failed to show the decedent left either widow or child, and stated no cause of action under section 3 of chapter 57; that the amended petition filed March 17, 1893, withdrawing the allegation of willful neglect, and charging that the death was caused by negligence, entirely changed the cause of action, and set up in substance a new ground for recovery; and he claims that the first paragraph of the amended answer, which consists of the plea of statute of limitations, should have been sustained, especially as plaintiff neither demurred to nor replied to this plea. The case of *Railroad Co. v. Privitt's Adm'r*, 92 Ky. 223, 17 S. W. 484, is relied on to sustain this contention that the amended petition set up an entirely separate and distinct cause of action, and that the same was in no sense an amendment to the original petition. We cannot concur in this contention of defendant. The essential averment of the original petition was the death of the intestate, and that this was occasioned by the act of the railroad company in running its cars over him. The amended petition did not set up a new cause of action, as it set out the same facts, and simply alleged a different degree of neglect from that complained of in the original petition; and as the facts stated both in the original and amended petition distinctly set out the time and circumstances of the death, and as the original petition was filed in the time required by law, we think the demurrer was properly overruled, and that the action could have been properly prosecuted as

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amended. Nor do we think there is anything in the opinion relied on which is inconsistent with this view, but it seems to us all the facts in this case clearly establish that the decedent contributed to his death by his own want of care."

"The evidence shows that the locomotive whistled at Denton station, not over 300 yards away; that the train was a long and noisy one; and that by reasonable care he could have avoided the accident. We do not think that the rule which has been established as applicable to cities, with regard to accidents in the corporate limits, applies to a hamlet like Denton, having no streets or alleys, although, where persons have been accustomed to use the track of a railroad company for passageway in certain localities, the company is charged with notice of such use, and is under obligations to keep a careful lookout in such cases, even though the parties so using the track are really without authority, and in fact trespassers. But we think that it is clear from the evidence that the deceased could not have been seen by those having charge of the train in time to have avoided the accident, and that no effort was lacking on their part, after he was discovered, to prevent the accident."

ILLINOIS CENT. R. Co.

v.

THOMAS.

(Supreme Court of Mississippi, March 22, 1897.)

Use of Streets for Car Tracks—Abutting Owners—Injunction.*—Certain land originally owned by defendant, a railroad company, had been dedicated by it to the use of a city for a valuable consideration, and had been used by the public notoriously, openly and adversely for a period of over 30 years prior to an attempt by defendant to lay a switch track on a strip of it 15 feet in width lying along side of its depot and platform. Defendant contended that this strip had never been used by the public as a part of the street, but had been used by defendant's patrons as an approach or driveway to defendant's freight platform, and had, in effect, remained in defendant's possession. *Held*, that defendant's contention was

*As to Injunction by Abutting Owners, see *Mobile & M. Ry. Co. et al. v. Alabama M. Ry. Co.*, (Ala.) *ante*, and *foot-note*.

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without merit ; and that an injunction would lie for the protection of and at the instance of an abutting owner to whose rights the laying of such switch track would be peculiarly injurious.

APPEAL by defendant from Yalabusha county chancery court. *Affirmed.*

Mayes & Harris, for appellant.

Brewer & Wilson, for appellee.

LUMIS *et al.*

v.

PHILADELPHIA TRACTION CO.

(*Supreme Court of Pennsylvania, April 26, 1897.*)

Accident at Street Crossing—Contributory Negligence.—Plaintiff, while attempting to cross a city street in broad daylight at a street crossing, stopped on defendant's track, and when the gong was rung on its car approaching from a distance of half a square, she, instead of crossing the track, stepped backwards and fell into a manhole. *Held*, that her fall was the result of her failure to use due care.

APPEAL by defendant from Philadelphia county court of common pleas. *Reversed.*

J. Howard Gendell, for appellant.

Henry M. Du Bois, for appellee.

GREEN, J., in delivering the opinion of the court, said: "We think the case comes clearly within the line of a very considerable class of cases in which the legal duty of persons walking on the streets and sidewalks of cities and towns is clearly defined. The rule is thus expressed in *Dickson v. Hollister*, 123 Pa. St. 421, 16 Atl. 484: 'It is the duty of every pedestrian upon a public highway to use reasonable care for his own safety, and to avoid an open or apparent danger.' In *Barnes v. Sowden*, 119 Pa. St. 53, 12 Atl. 804, the facts were quite similar to those of the present case. A trench had been dug about eight feet in length across the sidewalk, leaving a passage of about four feet in width between the end of the excavation and the house line. The earth was thrown up along the trench, making a bank of loose dirt about three feet high ex-

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tending the whole length of the trench. The plaintiff and her sister were coming along on the footwalk, and when they reached the trench they passed along the unbroken space between the trench and the building. When the plaintiff left the store window into which she had been looking, she took two or three steps backward, and fell into the trench, and was injured. The court below left the case to the jury, who returned a verdict for the plaintiff. On the single assignment of error for submitting the case to the jury, and for not taking it from them with a binding instruction for the defendant, we reversed the judgment without a venire."

MOON

v.

FINK *et al.**(Supreme Court of Georgia, June 9, 1897.)*

Accident at Crossing—Presumption of Negligence*—Evidence—Nonsuit.—Though the fact that the plaintiff's husband was killed by the running of the defendants' train raised against them the presumption of negligence, this presumption was rebutted by the plaintiff's evidence, and therefore, the granting of the nonsuit was right. (Syllabus by the Court.)

ERROR by plaintiff from Floyd county superior court.
Affirmed.

Fouche & Fouche, for plaintiff in error.

McCutchen & Shumate and *Hoskinson & Harris*, for defendants in error.

NOTES.

Accidents at Railroad Crossings—Negligence and Contributory Negligence—Presumptions.—It has been held that negligence upon the part of the person injured will be presumed from the mere fact of injury at a railway crossing. In a recent case in Indiana this doctrine was carried to the extent of holding that where a person was killed upon a railway crossing, and it was not affirmatively shown that he had been free from negligence, the presumption would be, that he had been guilty of contributory negligence, and consequently that no recovery could be had, even though there was evidence of negligence upon the part of the railroad company, and no evidence of negligence on the part of the deceased. In the course of the opinion MITCHELL, J., said, "It will not do to say, however, as the instruction in effect does, that if the plaintiff can show the defendant's negligence and his injury, he may leave his own conduct to

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conjecture, and recover. He must show the facts,—as well those which relate to his share in the transaction as those which relate to the defendant's; and if, upon the whole case, an inference of negligence arises against the defendant, and of due care on his part, he may recover. The fact that a person traveling on a highway comes in collision with a train on a railway crossing, is of itself sufficient to suggest a presumption of contributory negligence against him in a suit for compensation." And in accordance with this doctrine an instruction was held erroneous that stated the law to be, that if negligence of the defendant was proved, and no contributory negligence, or ground for inferring it, shown by the evidence, that plaintiff had sufficiently shown the deceased free from fault, and that "in the absence of circumstances to show or suggest it, there is no presumption of contributory negligence." *Ind., etc., R. Co. v. Greene*, 106 Ind. 279; s. c., 25 Am. & Eng. R. R. Cas. 322, 55 Am. Rep. 736.

So it has been held in Maine: "In an action for the death of a traveller on a highway at a railway crossing, there is no presumption that he used due care, and evidence as to his character and habits of carefulness is incompetent." *Chase v. Maine etc., R. Co.*, 77 Me. 62; s. c., 19 Am. & Eng. R. R. Cas. 356, 52 Am. Rep. 744; *State v. Maine, etc., R. Co.*, 76 Me. 357; s. c., 19 Am. & Eng. R. R. Cas. 312, 49 Am. Rep. 622.

And it has been held, that, in the absence of evidence of his negligence, the presumption that the injured person exercised care will prevail. Thus, in Pennsylvania, where the "Stop, look, and listen," doctrine is applied most rigidly, it is held that it is not incumbent on the plaintiff to show affirmatively that the decedent, killed upon a railway crossing, stopped, looked, and listened, before attempting to cross the track. In a recent case of this character, the Supreme Court of Pennsylvania says, "The common-law presumption is that every one does his duty, until the contrary is proved; and in the absence of all evidence on the subject, the presumption is, that the decedent observed the precautions which the law prescribed. In the case at bar no witness was called who saw the occurrence; there is no evidence whatever, whether, in fact, the decedent did stop and look and listen; the presumption is that he did; proof of that fact was no part of plaintiff's case. The presumption is of fact merely, and may be rebutted; but we are without evidence on the subject. All that we have is, that, as he came upon the railroad, he was struck down by the locomotive." And it was held that a recovery could be sustained. *Schum v. Penna., etc., R. Co.*, 107 Pa. St. 8; s. c., 52 Am. Rep. 468; *Penna., etc., R. Co., v. Weber*, 76 Pa. St. 157; s. c., 18 Am. Rep. 407. See also *Buesching v. Gas Co.*, 73 Mo. 219; s. c., 39 Am. Rep. 503; *Petty v. Hannibal, etc., R. Co.* (Mo. 1886), 28 Am. & Eng. R. R. Cas. 618, 626.

And it has been held that a jury may infer due care, and the absence of contributory negligence, on the part of a deceased person, from the general and well-known disposition of mankind to take care of themselves, and keep out of danger. *Northern Cent. R. Co. v. State*, 31 Md. 357; *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; *Gay v. Winter*, 34 Cal. 153; *Lehigh Valley R. Co. v. Hall*, 61 Pa. St. 361.

This conflict seems to arise from the different rules prevailing as to the burden of proof being upon plaintiff or defendant in cases.

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where contributory negligence is an issue. *Buesching v. Gas. Co.*, 73 Mo. 219; s. c., 39 Am. Rep. 503; *Petty v. Hannibal, etc., R. Co.* (Mo. 1886), 28 Am. & Eng. R. R. Cas. 618, 626; *Indiana, etc., R. Co. v. Greene*, 106 Ind. 279; s. c., 23 Am. & Eng. R. R. Cas. 322, 55 Am. Rep. 736; *Little Rock, etc., R. Co. v. Ubanks (Ark)*, 3 S. W. Rep. 808; *Cincinnati, etc., R. Co. v. Butler*, 103 Ind. 31; s. c., 23 Am. & Eng. R. R. Cas. 262. And see *Glasscock v. Central Pacific R. Co.* (Cal. 1887), 14 Pacific Rep. 518, and note on the various branches of this subject.

But the true rule is, that there is no presumption either way; and when negligence on the part of the railway company sufficient to account for the injury has been shown, and there is no evidence of contributory fault, the burden of the issue should shift, and plaintiff be entitled to recover, unless contributory negligence be affirmatively proved, the principle being that a sufficient cause having been shown, and no intervening efficient cause appearing, the negligence of the company should be held the sole proximate cause of the injury. "In cases where such issues are made, the question of contributory negligence on the part of plaintiff or his intestate, and of negligence on the part of defendant, causing the injury complained of, should be considered and determined upon the same principles and by the same rules exactly. *There is no presumption of negligence as against either party, except such as arises upon the facts proved. Indeed, the presumption of law is, that neither party was guilty of negligence; and such presumption must prevail until overcome by proof.*" *Cleveland, etc., R. Co. v. Crawford*, 24 Ohio St. 631; s. c., 15 Am. Rep. 633.

"But it is urged that, inasmuch as no witness testifies that the intestate looked to see, or listened to hear, if defendant's train was approaching, it must be assumed that he did not, and that such omission was negligence on his part. We know of no such rule. While it is true that a traveller, on approaching a railroad crossing, is bound to look and listen for an approaching train before undertaking to cross, it is only where it appears from the evidence that he might have seen had he looked, or might have heard had he listened, that the jury is authorized to find that he did not look, or did not listen." *Smedis v. Brooklyn, etc., R. Co.*, 88 N. Y.; s. c., 8 Am. & Eng. R. R. Cas. 445.

"When the plaintiff shows negligence on the part of defendant, and there is nothing to imply that the plaintiff brought on the injury by his own negligence, then the burden of proof is on the defendant to show that plaintiff was guilty of negligence." *Cassidy v. Angell*, 12 R. I. 447; s. c., 34 Am. Rep. 690.

"While those on the highway when about crossing a railroad track, must exercise proper diligence and care with reference to their own safety, where there is an absence of evidence as to the care exercised by the party injured, as in this case, it is not to be presumed that the deceased recklessly and carelessly imperilled his own life, or entered upon the track of the railroad knowing of the train's approach." *Louisville, etc., R. Co. v. Goetz*, 79 Ky. 442; s. c., 14 Am. & Eng. R. R. Cas. 627, 42 Am. Rep. 227.

So the doctrine, that when an efficient, adequate cause appears, it must be held the sole proximate cause in the absence of evidence of any other, is easily supported. Thus, "An efficient, adequate cause being found must be deemed the true cause, unless

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some other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result." *Adams v. Young*, 44 Ohio St. 80; s. c., 58 Am. Rep. 789; *Kellogg v. Chicago, etc., R. Co.*, 26 Wis. 223; s. c., 7 Am. Rep. 69.

In *Milwaukee, etc., R. Co. v. Kellogg*, 94 U.S. 469, it was said, "Where there is no intermediate, efficient cause, the original wrong must be considered as reaching to effect and proximate to it. In such cases it is necessary to determine the proximate cause of the injury or death; and defendant's negligence once established, and no other proximate cause being shown, such negligence should be held the sole proximate cause." *Ins. Co. v. Tweed*, 7 Wall. (U. S.) 44; *Scheffer v. Washington, etc., R. Co.*, 105 U. S. 251; s. c., 8 Am. & Eng. R. R. Cas. 61. See also *Cooley on Torts*, 664; *Penna. Co. v. Marshall*, 119 Ill. 399; *Gulf, etc., R. Co. v. Rediker* (Tex. 1886), 2 S. W. Rep. 513; *Gugenheim v. Lake Shore, etc., R. Co.* (Mich. 1887), 9 Western Rep. 906; s. c., 33 N. W. Rep. 161; s. c., (first trial), 57 Mich. 488.

In a recent Illinois case the doctrine stated above seems to have been directly declared. It was there held that at the conclusion of plaintiff's evidence it would have been proper to have nonsuited the plaintiff, *because no evidence had been given of negligence upon the part of the defendant, but that when it appeared from the evidence given for defendant that it had been guilty of negligence, a recovery could be sustained without direct proof that the deceased was free from fault.* *Chicago, etc., R. Co. v. Carey*, 115 Ill. 115; s. c., 2 West Rep. 73; *Raymond v. Burlington, etc., R. Co.*, 65 Iowa, 152; s. c., 18 Am. & Eng. R. R. Cas. 217; *Phila., etc., R. Co. v. Boyer*, 97 Pa. St. 91; s. c., 2 Am. & Eng. R. R. Cas. 172; *Savannah, etc., R. Co. v. Barber*, 71 Ga. 644; *Phila. etc., R. Co. v. Stebbing*, 62 Md. 504; s. c., 19 Am. & Eng. R. R. Cas. 36; *Jones v. N. Y. Cent., etc., R. Co.*, 28 Hun (N. Y.), 364; *Smedis v. Brooklyn, etc., R. Co.*, 23 Hun (N. Y.), 279.

"If the plaintiff's evidence shows an injury by defendant's negligence, and does not raise the implication that his own contributed, the burden of proof of such contributory negligence as will defeat the recovery rests upon the defendant." *Baltimore, etc., R. Co. v. Whitacre*, 35 Ohio St. 627, 630; Ill., etc., *R. Co. v. Cragin*, 71 Ill. 177; *Penna. R. Co. v. Goodman*, 62 Pa. St. 239.

It may be thought that these principles are only applicable in jurisdictions where the burden of proof of contributory negligence is upon the defendant, but a little reflection will show that this is not true. Even where the burden of proving freedom from contributory negligence is on the plaintiff, it is quite sufficient, on principle, to show that the defendant's negligence was adequate to have caused the injury, and that there is no evidence of any other sufficient cause—that is, no evidence of fault on the plaintiff's part, or that of the deceased. In such case the law must ascribe the injury to the only cause found.

Why No Presumption Should Arise.—As the mere fact of the injury raises no presumption that the railway company was negligent, it certainly should not raise one that the injured person was.

"Indeed, the presumption of law is that neither party was guilty of negligence, and such presumption must prevail until overcome by proof. As a general rule, the existence of negligence, on either side, is a fact to be ascertained by the jury under proper instructions

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from the court." *Cleveland, etc., R. Co. v. Crawford*, 24 Ohio St. 631; s. c., 15 Am. Rep. 633; *Savannah, etc., R. Co. v. Geiger*, 21 Fla. 669; s. c., 29 Am. & Eng. R. R. Cas. 274, 58 Am. Rep. 697.

"In actions for injury by negligence, where there is nothing in plaintiff's evidence tending to show contributory negligence, the presumption will be that there is no contributory negligence, and this presumption remains until the contrary is shown." *Pittsburgh, Cincinnati, etc., R. Co. v. Fleming*, 30 Ohio St. 480, 485.

Modification of Doctrine When Persons non sui juris.—The rules here laid down, like most other doctrines of the law of negligence, are founded upon the care to be expected of a careful and prudent man under such circumstances, and, in accord with principles already stated, they are somewhat modified in their application to children of tender years; or, rather, the railway company is charged [with notice of the fact that children as well as adults, may be upon the highway, and must exercise greater care to avoid injuring them than an adult is entitled to demand. It is held that more care is required towards children of tender years at crossings than toward adults. *Thurber v. Harlem, etc., R. Co.*, 60 N. Y. 326; *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445; *McGovern v. N. Y., etc., R. Co.*, 67 N. Y. 421; *Elkins v. Boston, etc., R. Co.*, 115 Mass. 190; *Chicago, etc., R. Co. v. Becker*, 84 Ill. 483; *Costello v. Syracuse, etc., R. Co.*, 6 Barb. (N. Y.) 92; *Haas v. Chicago, etc., R. Co.*, 41 Wis. 44; *Paducah, etc., R. Co. v. Hoche*, 12 Bush (Ky.), 41; *Boland v. Missouri, etc., R. Co.*, 36 Mo. 484; *Isabel v. Hannibal, etc., R. Co.*, 60 Mo. 475; *Chicago, etc., R. Co. v. Murray*, 71 Ill. 601; *Johnson v. Chicago, etc., R. Co.*, 49 Wis. 529; s. c., 1 Am. & Eng. R. R. Cas., and *note* collecting many cases on this and related topics; *Mobile, etc., R. Co. v. Crenshaw*, 65 Ala. 567; s. c., 8 Am. & Eng. R. R. Cas. 340; *Schwier v. N. Y. Cent. R. Co.*, 90 N. Y. 558; s. c., 14 Am. & Eng. R. R. Cas. 656; *Wendall v. N. Y. Cent. R. Co.*, 91 N. Y. 420; s. c., 14 Am. & Eng. R. R. Cas. 663; *Nehrbras v. Cent. Pac. R. Co.*, 62 Cal. 320; s. c., 14 Am. & Eng. R. R. Cas. 670.

LOUISVILLE, N. A. & C. Ry. Co.

v.

PATCHEN.

(*Supreme Court of Illinois, June 8, 1897.*)

Accident at Crossing—Ordinance Limiting Speed—Admission by Implication.—In an action against a railroad company for the negligent killing of plaintiff's intestate at a railroad crossing, plaintiff introduced in evidence an ordinance of a city which limited the speed of trains within its limits, and defendant only objected to the admission of such ordinance as evidence upon the ground that it had been repealed. *Held*, that defendant had by implication admitted that the crossing was in such city.

Ordinances—Evidence of.—When a party wishes to introduce a city ordinance in evidence, and claims that it is printed in a certain book, such book is not admissible as evidence, unless it purports to be published by authority of such city.

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Negligence—Instruction.—A charge which merely told the jury that it was the defendant's duty to give certain signals under certain circumstances, but left it for them to determine whether or not they had been given, and whether or not deceased could have heard them, if given, did not tell the jury, in effect, that defendant was liable if such signals had not been given, nor that contributory negligence was no defense.

Same.—It is not error to refuse to instruct on a point not involved in the case.

Contributory Negligence—Instruction.*—Defendant requested the court to instruct that if there were on the side tracks, where the accident happened, cars which obstructed the view of the approaching train, that fact would have imposed upon deceased the duty to exercise a higher degree of care in looking out for danger; and that his failure to do so would prevent a recovery. *Held*, that it was not error to refuse to give such instruction, it not being the duty of the court to inform the jury that the existence of one fact or another would defeat a recovery.

Question for Jury—Instructions.—It was not error to refuse to instruct that those in charge of the train had a right to assume that deceased would exercise due care for his own safety; and that if he was, when those in charge of the train first caught sight of him, at such a distance from the track as to be in no danger of a collision with the train, they could assume that he would remain at such distance, whether or not they had a right to assume such facts being a question for the jury.

Direction of Verdict.—Where there is evidence tending to prove a cause of action it is not error to refuse to direct a verdict for defendant.

APPEAL by defendant from First district appellate court. *Affirmed.*

G. W. Kretzinger, for appellant.

G. W. & W. Plummer, for appellee.

“The court, in delivering its opinion, said: The fourth refused instruction directed the jury, in substance, that if there were on the side tracks, where the accident happened, cars which obstructed the view of the approaching train, that fact would impose upon deceased the duty to exercise a higher degree of care for his personal safety in ascertaining whether it was prudent to cross, and, if he failed to do so, plaintiff could not recover. The law is well settled that plaintiff could not recover unless the deceased exercised due and proper care for his safety; in other words, unless the deceased was free from negligence which contributed to the injury, a recovery could not be had. But

*See note at end of case.

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whether the deceased was guilty of negligence, or whether he was free from any negligence whatever, were questions of fact for the jury; and it was no part of the duty of the court to inform the jury that the existence of one fact or another fact would defeat a recovery. The instruction was liable to this objection, and for that reason, if for no other, the court did not err in refusing to give.

"Refused instruction No. 5 was as follows: '(5) The court instructs the jury that the servants in charge of defendant's engine and train which struck the deceased had a right to assume that he was rational, and that he would exercise reasonable care and caution to keep himself out of danger; and if the jury believes from the evidence that, when the persons in charge of the engine and train first came in sight of the deceased, he was so far removed from the track as to be free from danger of collision, then they had a right to assume that he would remain at such a distance.' An instruction somewhat similar was held to be a correct statement of the law in *Railroad Co. v. Austin*, 69 Ill. 429; but in later cases the tendency of the decisions has been to the effect that the matters and things stated in the instruction which the servants of the railroad company might, as a matter of law, assume, were questions of fact for the determination of the jury. In *Railroad Co. v. Kellum*, 92 Ill. 245, where an action was brought to recover for the killing of an animal through the negligence of the railroad company on a railroad crossing, it was held: 'Where an engine driver sees or can see, in time to slacken the speed of his train, a lot of cattle crossing the railroad track upon a highway, but does not stop the train or slacken its speed, and kills an animal, this will establish negligence on his part, and the railroad company will be liable.' In *Pennsylvania Co. v. Frana*, 112 Ill. 405, it was claimed that the court erred in refusing to give an instruction which read as follows: 'The jury are instructed that those in charge of the train which collided with the plaintiff were not bound to stop the same in anticipation that

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plaintiff might drive upon the track.' But the court held otherwise, and, in disposing of the question, said: 'It was for the jury to determine from all the evidence whether those in charge of the train were guilty of negligence in not stopping the train before the collision occurred. Cases might occur where a railroad would be under no obligation whatever to stop its train, and, on the other hand, cases might arise where a failure to do so would be gross negligence. Each case must be determined by its facts, and those facts are for the jury.' In *Railroad Co. v. Slater*, 139 Ill. 190, 28 N. E. 830, a similar question arose, and, in disposing of it, the court said: 'It is next claimed that the court erred in refusing defendant's instructions Nos. 17 and 18. No. 17 in substance informed the jury that it was not a want of ordinary care for a train of cars to approach a highway crossing at its usual speed, although there is a team approaching. On the trial of a case of this character, negligence is a question of fact for the jury, to determine from the evidence; and it is not the province of the court to tell the jury in an instruction that one thing is negligence, and another not, but the jury should be left free and untrammelled to determine from all the evidence who has been negligent, and who has not. No. 18 informed the jury that an engineer has a right to presume that a team approaching a crossing will stop, etc. What has been said in regard to No. 17 will apply here. It was improper for the court to say, as a matter of law, that the engineer might presume anything. Presumptions have nothing to do with the question involved.' What was said in the case last cited applies here. The question before the jury was whether the deceased lost his life through the negligence of the railroad company in running its train over the highway, or whether the death of deceased was caused by his negligence in failing to exercise ordinary care in crossing the railroad track. The question was one purely of fact, and whether the servants of the railroad company in charge of the train might assume one thing or another was a question for the jury to determine from all the

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evidence, and not a question of law; and, had the instruction submitted the question as one of fact, it might be sustained, but as the instruction directed the jury, as a question of law, that the servants of the railroad in charge of the train might assume certain things therein specified, it was erroneous."

NOTE.

Accidents at Crossings—Contributory Negligence—Province of Court and Jury.—If the facts are disputed, or it is doubtful whether, under the circumstances, failure to stop, look, or listen was negligence proximately contributing to the injury, the question of a failure to use ordinary care, and of the effect of a failure to stop, look, or listen, should be left to jury. Thus the supreme court of Ohio say, "Again, failure to look or listen for an approaching train, though such failure may contribute to the injury, cannot, under all circumstances, be regarded as negligence. . . . When, therefore, a person about to cross a railroad track under a given state of circumstances, exercises that degree and amount of care which prudent persons usually exercise under like circumstances, he is without fault. In other words, when the circumstances are such that prudent persons would not ordinarily look or listen for an approaching train, there is no negligence in omitting to look or listen. If this be correct, it is plain, as a general rule, that whether contributory negligence existed or not, is a mixed question of law and fact; that is to say, a fact for the jury to find from such testimony as the law regards competent to prove it, and to be found in accordance with such rules as the court may give to the jury for their guidance. *Cleveland, etc., R. Co. v. Crawford*, 24 Ohio St. 631; s. c., 15 Am. Rep. 633; *Petty v. Hannibal, etc., R. Co.* (Mo. 1886), 28 Am. & Eng. R. Cas. 618; *Hathaway v. East Tenn., etc., R. Co.*, 29 Fed. Rep. 489; *Greauy v. Long Island R. Co.*, 101 N. Y. 419; s. c., 24 Am. & Eng. R. Cas. 473; *Penna. R. Co. v. Garvey*, 108 Pa. St. 369; *Drain v. St. Louis, etc., R. Co.*, 86 Mo. 574; *Lincoln v. Gillilan*, 18 Neb. 114; *Johnson v. Mo. Pac. R. Co.*, 18 Neb. 690; *Palmer v. Detroit, etc., R. Co.*, 56 Mich. 1; *Ferguson v. Wisconsin, etc., R. Co.*, 63, Wis. 145; s. c., 19 Am. & Eng. R. Cas. 285; *Orange, etc., H. R. Co. v. Ward*, 47 N. J. L. 560; *Leavitt v. Chicago, etc., R. Co.*, 64 Wis. 228; *Tyler v. N. Y. etc., R. Co.*, 137 Mass. 238; s. c., 19 Am. & Eng. R. Cas. 276; *Hutchinson v. St. Paul, etc., R. Co.*, 32 Minn. 398; s. c., 19 Am. & Eng. R. Cas. 280; *Copley v. New Haven, etc., R. Co.*, 136 Mass. 6; s. c., 19 Am. & Eng. R. Cas. 372; *Scott v. Wilmington, etc., R. Co.* (N. Car. 1887), 2 S. E. Rep. 151; *Loucks v. Chicago, etc., R. Co.*, 31 Minn. 526; s. c., 19 Am. & Eng. R. Cas. 305; *Nehrbas v. Central Pacific R. Co.*, 62 Cal. 320; s. c., 14 Am. & Eng. R. Cas. 670; *Funston v. Chicago, etc., R. Co.*, 61 Iowa, 452; s. c., 14 Am. & Eng. R. Cas. 640; *Stackus v. N. Y. Central, etc., R. Co.*, 79 N. Y. 464; *Detroit etc., R. Co. v. Van Steinberg*, 17 Mich. 99; *Beisiegel v. N. Y., etc., R. Co.*, 34 N. Y. 622.

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LEHMANN

v.

DEUSTER *et al.*

(*Supreme Court of Wisconsin, Feb. 2, 1897.*)

Personal Injuries—Right of Action Assignable.*—A cause of action against a railroad company for injuries sustained through its negligence is, under the law of Wisconsin, assignable before judgment.

Same—Garnishment.—But a mere verdict against defendant in such action, prior to a judgment, does not create a liability which can be garnished.

APPEAL by plaintiff and certain defendants from Milwaukee county superior court. *Affirmed.*

Sylvester, Scheiber, Riley & Orth, for appellants.

Haring & Frost and *Julius E. Roehr*, for respondent.

WINSLOW, J., in delivering the opinion of the court, said: "If the cause of action survived, it was assignable. *Webber v. Quaw*, 46 Wis. 118, 49 N. W. 830. It is well understood that such an action does not survive at common law; hence the question is whether it survives under section 4253, Rev. St., as amended by chapter 280, Laws 1887. That section reads as follows, the amendments of 1887 being printed in italics: "In addition to the actions which survive at common law, the following shall also survive, that is to say: Actions for the recovery of personal property or the unlawful *withholding and conversion thereof*, actions for assault and battery or false imprisonment, *or other damage to the person*, or for goods taken and carried away, and actions for damages done to real and personal estates. *All equitable actions to set aside conveyances of real estate, or to compel a reconveyance thereof, and all actions for a specific performance of contracts relating to real estate.*" The question whether the section, as changed by the act of 1887, includes a cause of action for personal injuries resulting from negligence, has not been decided by this court. It was raised in *Hiner*

*See note at end of case.

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v. City of Fond du Lac, 71 Wis. 74, 36 N. W. 632, but expressly left undetermined. Under a statute in almost identical terms, in Massachusetts, such a cause of action was held to be included. *Norton v. Sewall*, 106 Mass. 143. It was there said that the words "include every action the substantial cause of which is bodily injury." See, also, *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397. The language of the Massachusetts statute was, "actions of replevin or tort for assault, battery, imprisonment, or other damage to the person." The only difference in the two sections which is material to the present inquiry is that the Massachusetts statute rather unnecessarily refers to the action as a "tort action." This adds nothing and takes away nothing from the meaning of the words. It does not seem to us that there is any room for mere construction. The words of the statute are plain. They are to the effect that an action for assault and battery, false imprisonment, or other damage to the person, shall survive. The injury resulting from being run over by a street car is certainly "other damage to the person" and it is damage of the same character as the damage resulting from an assault and battery; that is, it is physical pain and suffering. We are referred to no other statutes of this character, save the Massachusetts statute. The amendment of 1887 incorporated the words of that statute in our own after they had received a construction there. It might be argued that we took the law with the construction. But, whether this be so or not, the construction seems to us entirely reasonable and logical, and we adopt it."

"The second question is whether a mere verdict in a purely tort action creates a liability which can be garnished. The garnishee is not liable unless at the time of the service of process his liability to the principal defendant is absolute. Rev. St. § 2768; *Vollmer v. Railway Co.*, 86 Wis. 305, 56 N. W. 919. The question of liability or not is fixed at the time of the service of process, and it must then be absolute, though perhaps payable subsequently. If, however, the liabil-

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ity is contingent on a future, uncertain event, it is not subject to garnishment. *Edwards v. Roepke*, 74 Wis. 571, 43 N. W. 554; *Dowling v. Insurance Co.*, 89 Wis. 96, 61 N. W. 76. A mere claim for personal injuries is not the subject of garnishment. *St. Joseph Manuf'g Co. v. Miller*, 68 Wis. 389, 34 N. W. 235. The verdict does not turn it into a debt, nor into an absolute liability. That must be done, if at all, by the judgment. No matter how long a verdict remained on the records of the court, no action could ever be maintained upon it. *Thayer v. Southwick*, 8 Gray, 229; *Rood, Garnish.* § 122. The case of *Jones v. St. Onge*, 67 Wis. 520, 30 N. W. 927, is claimed to support the contrary doctrine. While there may be language in the opinion in that case which would tend to support the theory that a mere verdict in a tort action is subject to garnishment, the case itself was evidently rightly decided upon another ground. In that case the garnishee had been sued in replevin for certain logs by the main defendant, and the verdict rendered was that St. Onge, the main defendant, was the owner of the logs, and that the garnishee unlawfully withheld possession of them, and fixed their value. After verdict, and before judgment, the garnishment papers were served. It was plainly a proper case for garnishment, because the garnishee had property of the main defendant in his hands, or was indebted to him therefor, at the time process was issued. In fact, the verdict neither helped nor hindered the liability of the garnishee. He would have been liable had no suit been pending at all, because he had property of the main defendant in his hands at the time the garnishee process was served, or was indebted to the main defendant to the amount of the value of such property. So far as the *St. Onge Case* seems to justify the doctrine that a mere verdict in action to recover damages for personal injuries is the subject of garnishment, we cannot follow it. It follows that the plaintiff's garnishment must fail, because she garnished after verdict, and before judgment, and the *Farwell & Co.* process becomes the first lien upon

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the moneys in court after the claim of Mrs. Deuster is paid. These were the conclusions reached by the court below."

NOTE.

Personal Injuries—Assignment of Right of Action.—The general doctrine both in law and in equity, is that a right of action for a pure tort is not the subject of assignment. *Stanly v. Duhurst*, 2 Root (Conn.) 52; *Bird v. Hempstead*, 3 Day (Conn.) 272, 3 Am. Dec. 269; *Kansas Midland R. Co. v. Brehm*, 54 Kan. 751; *Final v. Backus*, 18 Mich. 218; *Finn v. Corbitt*, 36 Mich. 318; *Hyslop v. Randall*, 11 How. Pr. (N. Y. Super. Ct.) 497; *Gardner v. Adams*, 12 Wend. (N. Y.) 297; *Somms v. Wilt*, 4 S. R. (Pa.) 19.

In *Oliver v. Walsh*, 6 Cal. 456, the rule is laid down broadly that a cause of action for a tort is not assignable. See also *Norton v. Tuttle*, 60 Ill. 130.

This rule has been changed to some extent by statute, and has been modified also by provisions with reference to what choses in action will survive or abate at the death of either or both of the parties. *Kansas Midland R. Co. v. Brehm*, 54 Kan. 751; *Haight v. Hayt*, 19 N. Y. 464. See also *Hall v. Cincinnati, etc., R. Co.*, 1 Disney (Ohio) 58.

The rule of law that a cause of action founded on injuries to the person is not assignable has not been altered by the Code of New York. *Purple v. Hudson River R. Co.*, 1 Abb. Pr. (N. Y.) 33, 4 Duer 74.

O'BEIRNE*

v.

ALLEGHANY & K. R. Co. *et al.*

(*Court of Appeals of New York, Jan. 19, 1897.*)

Bondholders—Specific Performance—Parties.—A & B, being the owners of all the stock of three railroad companies, entered into an agreement with N for the purpose of consolidating the three roads and creating a lien on certain real estate to secure a future issue of bonds. By this agreement A and B were under contract to deliver to a trustee a mortgage on certain lands, of which B falsely represented himself to N to be the owner. But, in violation of the contract with N, a mortgage on other and less valuable lands was delivered to the trustee—to the prejudice of the rights of future bondholders of the new corporation. *Held*, that a bondholder, in behalf of himself and other bondholders, could maintain an action for the specific performance of the contract, or for damages sustained by a breach of its covenants and agreements.

Same—Same—Same.—And the railroad company, being a party to the agreements in the mortgage with respect to the security to be furnished was properly made a defendant.

*For full report of this case see 7 Am. & Eng. Corp. Cas., N. S., 262, and *note*, p. 272.

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DOWNING *et al.*

v.

OUTERBRIDGE.

(*Circuit Court of Appeals, Second Circuit, April 8, 1897.*)

Conversion of Goods by Carrier—Measure of Damages.*—In an action in tort for the conversion of flowers intrusted with defendant's expressmen, for delivery to plaintiff's customers, the proper measure of damages is the value of the merchandise at the time and place of conversion; and an instruction that the jury might give a verdict for what the flowers were worth to plaintiff at the place of delivery to go to his customers was not misleading, they having been expressly charged that they were to allow plaintiff nothing for the injury to his reputation for failure to fulfill his contracts with his customers.

Same—Punitive Damages.—In such action, it was not error to charge that if the jury found that defendants in such act of conversion were guilty of wantonly overriding plaintiff's rights they might allow punitive damages.

Same—Admissibility of Evidence.—It was not error to exclude evidence as to plaintiff's reputation and financial standing at the place of shipment, the jury having been instructed that no damages could be allowed him on account of loss of reputation.

Defense—Negligence in Marking.—In such action it was not error to refuse to instruct that negligence on the part of plaintiff in shipping the goods and marking the boxes in which they were shipped would bar recovery for their conversion, the boxes having been numbered, and known by defendants to belong to plaintiff.

ERROR by defendant to the Circuit Court of the United States for the Southern District of New York.
Affirmed.

C. P. McClelland, for plaintiffs in error.

Edward C. Perkins, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

NOTE.

Carriers of Freight—Loss of Goods—Measure of Damages.—The general rule is that in case of a loss of the goods the measure of damages recoverable by the shipper is the market value of the goods at the point of destination, with interest from the time they should have been delivered, less the amount of the freight charges due for their transportation.

England.—*Brandt v. Bowlby*, 2 B. & Ad. 932. 22 E. C. L. 214; *O'Hanlan v. Great Western R. Co.*, 6 B. & S. 484, 118 E. C. L. 484; *Anderson v. North Eastern R. Co.*, 9 W. R. 519. See also *Redman's Law of Ry. Carr.* (2d Ed.), p. 134; *Hiort v. London, etc., R. Co.*, 4 Exch. Div. 188, 27 W. R. 778; *Waller v. Midland Great Western R. Co.*, L. R. 4 Ir. 376, *reversing* L. R. 1 Ir. 520.

Canada.—*Worden v. Canadian Pac. R. Co.*, 13 Ont. Rep. 652, 30 Am. & Eng. R. Cas. 127; *Leader v. Northern R. Co.*, 3 Ont. Rep. 92, 16 Am. & Eng. R. Cas. 287.

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United States.—Woodward *v.* Illinois Cent. R. Co., 1 Biss. (U. S.) 403; Mobile, etc., R. Co. *v.* Jurey, 111 U. S. 584; New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 54 Am. & Eng. R. Cas. 487, 41 Fed. Rep. 853; Ormsby *v.* Union Pac. R. Co., 4 Fed. Rep. 706, 2 McCrary (U. S.) 48.

Alabama.—South, etc., Alabama R. Co. *v.* Wood, 72 Ala. 451, 18 Am. & Eng. R. Cas. 634; Louisville, etc., R. Co. *v.* Gilmer, 89 Ala. 534, 42 Am. & Eng. R. Cas. 450; Echols *v.* Louisville, etc., R. Co., 90 Ala. 366; Louisville, etc., R. Co. *v.* Kelsey, 89 Ala. 287, 42 Am. & Eng. R. Cas. 584; East Tennessee, etc., R. Co. *v.* Johnston, 75 Ala. 596, 22 Am. & Eng. R. Cas. 437, 51 Am. Rep. 489.

California.—Ringgold *v.* Haven, 1 Cal. 108.

Illinois.—Chicago, etc., R. Co. *v.* Dickinson, 74 Ill. 249 (purely a question of fact for the jury); Northern Transp. Co. *v.* McClary, 66 Ill. 233; Chicago, etc., R. Co. *v.* Dickman, 74 Ill. 249.

Iowa.—Robinson *v.* Merchants' Despatch Transp. Co., 45 Iowa, 470; Cobb *v.* Illinois Cent. R. Co., 38 Iowa, 601.

Kentucky.—Cincinnati, etc., R. Co. *v.* Spratt, 2 Duv. (Ky.) 4.

Louisiana.—Price *v.* The Uriel, 10 La. Ann. 413; Rathbone *v.* Neal, 4 La. Ann. 563, 50 Am. Dec. 579.

Maine.—Little *v.* Boston, etc., R. Co., 66 Me. 239; Perkins *v.* Portland, etc., R. Co., 47 Me. 573, 74 Am. Dec. 507.

Maryland.—Baltimore, etc., R. Co. *v.* Pumphrey, 59 Md. 390, 9 Am. & Eng. R. Cas. 331.

Minnesota.—Jellett *v.* St. Paul, etc., R. Co., 30 Minn. 265, 16 Am. & Eng. R. Cas. 246.

Mississippi.—Vicksburg, etc., R. Co. *v.* Ragsdale, 46 Miss. 458.

Missouri.—Union R., etc., Co. *v.* Traube, 59 Mo. 355, 8 Am. Ry. Rep. 441; Davis *v.* Wabash, etc., R. Co., 13 Mo. App. 449, *reversed on other grounds*, 89 Mo. 340; Rice *v.* Indianapolis, etc., R. Co., 3 Mo. App. 27; Sturgeon *v.* St. Louis, etc., R. Co., 65 Mo. 569.

Nebraska.—Atchison, etc., R. Co. *v.* Lawler, 40 Neb. 356, 61 Am. & Eng. R. Cas. 255.

New Hampshire.—Hackett *v.* Boston, etc., R. Co., 35 N. H. 390.

New York.—Sturgess *v.* Bissell, 46 N. Y. 462; Rice *v.* Ontario Steamboat Co., 56 Barb. (N. Y.) 384; Harris *v.* Delaware, etc., R. Co., 61 N. Y. 656 (interest also recoverable); Sherman *v.* Wells, 28 Barb. (N. Y.) 403; Rice *v.* Ontario Steamboat Co., 56 Barb. (N. Y.) 384; Harris *v.* Panama R. Co., 5 Bosw. (N. Y.) 312; Davis *v.* New York, etc., R. Co., 1 Hilt. (N. Y.) 543.

Ohio.—Erie R. Co. *v.* Lockwood, 28 Ohio St. 358, 14 Am. Ry. Rep. 143 (interest recoverable); McGregor *v.* Kilgore, 6 Ohio 358, 27 Am. Dec. 260.

Oregon.—Prettyman *v.* Oregon R., etc., Co., 13 Oregon 341, 25 Am. & Eng. R. Cas. 413, *note*.

Pennsylvania.—Lucesco Oil Co. *v.* Pennsylvania R. Co., 2 Pittsb. (Pa.) 477 (interest recoverable); Gillingham *v.* Dempsey, 12 S. & R. (Pa.) 183; Ruppel *v.* Alleghany Valley R. Co., 167 Pa. St. 166, 46 Am. St. Rep. 666, 36 W. N. C. (Pa.) 210; Hand *v.* Baynes, 4 Whart. (Pa.) 204, 33 Am. Dec. 54.

South Carolina.—Kyle *v.* Laurens R. Co., 10 Rich. L. (S. Car.) 382, 70 Am. Dec. 231 (factor's commission not to be deducted; interest recoverable); Shaw *v.* South Carolina R. Co., 5 Rich. L. (S. Car.) 462, 57 Am. Dec. 768; Wallingford *v.* Columbia, etc., R. Co., 26 S. Car. 258, 30 Am. & Eng. R. Cas. 40.

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Tennessee.—Dean *v.* Vaccaro, 2 Head (Tenn.) 488, 75 Am. Dec. 744; East Tennessee, etc., R. Co. *v.* Kelly, 91 Tenn. 699; Louisville, etc., R. Co. *v.* Mason, 11 Lea (Tenn.) 116, 16 Am. & Eng. R. Cas. 241. *Compare* Edminson *v.* Baxter, 4 Hayw. (Tenn.) 112, 9 Am. Dec. 751.

Texas.—Fowler *v.* Davenport, 21 Tex. 626; Missouri, etc., R. Co. *v.* Cook, 8 Tex. Civ. App. 376; Missouri Pac. R. Co. *v.* Barnes, 2 Tex. App. Civ. Cas., § 575; Gulf, etc., R. Co. *v.* Clark, 2 Tex. App. Civ. Cas., § 512, 18 Am. & Eng. R. Cas. 628; Texas, etc., R. Co. *v.* Tankersley, 63 Tex. 57; Tex. Pac. R. Co. *v.* Nicholson, 61 Tex. 491.

Vermont.—Laurent *v.* Vaughn, 30 Vt. 90.

West Virginia.—Quarrier *v.* Baltimore, etc., R. Co., 20 W. Va. 424, 18 Am. & Eng. R. Cas. 535.

Wisconsin.—Chapman *v.* Chicago, etc., R. Co., 26 Wis. 295, 7 Am. Rep. 81; Whitney *v.* Chicago, etc., R. Co., 27 Wis. 327, 5 Am. Ry. Rep. 291 (interest recoverable); Dean *v.* Chicago, etc., R. Co., 43 Wis. 305.

DIXIE CIGAR CO.

v.

SOUTHERN EXP. CO.

(*Supreme Court of North Carolina, April 13, 1897*).

Carriers of Freight—Limiting Time Within Which Claim for Loss May be Made.*—A stipulation that the common carrier shall not be liable for the loss or damage of goods, unless demand for indemnity on account of such loss or damage is made within 30 days from the date of the bill of lading, is void where the common carrier's instructions to its agents contemplate the detention of the goods for more than 30 days at the receiving point before the shipper is informed that the consignee cannot be found.

APPEAL by defendant from Forsyth county superior court. *Affirmed*.

Watson & Buxton, for appellant.

Jones & Patterson, for appellee.

CLARK, J., in delivering the opinion of the court, said: "Stipulations in a bill of lading restricting the common-law liability of a common carrier are invalid, unless reasonable, because the parties are not dealing on an equal footing. *Railroad Co. v. Lockwood*, 17 Wall. 357."

NOTE.

Carriers—Stipulation Requiring Claim for Loss of Goods to Be Made Within Fixed Time—Question of Reasonableness.—The stipulation is valid only where it does not appear that the limit of time fixed is unreasonable; if the time limited is unreasonably short with reference to the circumstances of any particular case the stipulation will not be allowed to affect the shipper's rights, though the time fixed might be abundantly reasonable in all ordinary cases.

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Adams Express Co. *v.* Reagan, 29 Ind. 21, 92 Am. Dec. 332 ; Goggin *v.* Kansas Pac. R. Co., 12 Kan. 419; Browning *v.* Long Island R. Co., 2 Daly (N. Y.) 117 ; Memphis, etc., R. Co. *v.* Holloway, 9 Baxt. (Tenn.) 188.

A provision in a bill of lading that consignees are requested to notify the company of any errors within twenty-four hours "or the company will consider their liability as ended," will not prevent a shipper from suing for damages to goods caused by the carrier's negligence, although no notice was given of the loss. Sanford *v.* Houston R. Co., 11 Cush. (Mass.) 155.

In another case one of the conditions in the bill of lading was to the effect that no claim for loss or detention should be allowed unless notice in writing and particulars of the claim was "given to station freight agent at or nearest to the place of delivery within thirty-six hours after the goods, in respect to which said claim is made, are delivered." It was held that this provision was applicable to shipments beyond the terminus of the defendant's railway, but that in view of the nature of the property and of the claim for damages, the time specified was unreasonable, and so it was not applicable to the shipments in question, and a failure to give such a notice was not a bar to a recovery. Jennings *v.* Grand Trunk R. Co., 127 N. Y. 438, 49 Am. & Eng. R. Cas. 98, *affirming* 52 Hun (N. Y.) 227.

In Adams Express Co. *v.* Reagan, 29 Ind. 21, 92 Am. Dec. 332, a limitation of thirty days for the presentation of a claim was held unreasonable, in view of the state of war then in existence and the disturbed condition of the country and of transportation. It was held that the stipulation was, under the circumstances, void as against public policy.

Where the injury is of such a character that its extent and effect cannot be determined for some time, the stipulation cannot bar the shipper's action. Thus, where a young bull was injured in transit, but it was some months before the owner could discover the effect of the injury, it was held that he might maintain his action although the stipulated time had long been passed. Harned *v.* Missouri Pac. R. Co., 51 Mo. App. 482.

Where the notice is required to be presented within thirty days after the loss or injury, and it appears that that length of time might fairly be required for the transportation of the goods to their destination, the limitation is unreasonable and will not be enforced. Central Vermont R. Co. *v.* Soper, 59 Fed. Rep. 879, 61 Am. & Eng. R. Cas. 151, *note*. And in Pacific Express Co. *v.* Darnell, (Tex. 1887) 6 S. W. Rep. 765, a limit of sixty days from the date of shipment, without reference to the time of loss, was held unreasonable.

It seems that the burden of proof is on the carrier, where there is a stipulation requiring the shipper, as a condition precedent to any right of recovery, to give notice of his claim within the prescribed time, to prove facts and circumstances showing the stipulation to be a reasonable one and to prove a violation of the stipulation on the part of the shipper.

Houston, etc., R. Co. *v.* Davis, 11 Tex. Civ. App. 24 ; Houston, etc., R. Co. *v.* Davis, (Tex. 1895) 32 S. W. Rep. 510 (and such facts should be pleaded by the carrier) ; St. Louis, etc., R. Co. *v.* Hays, (Tex. Civ. App. 1896) 35 S. W. Rep. 476 ; Missouri Pac. R. Co. *v.* Paine, 1 Tex. Civ. App. 621 (limitation of one day). Compare Atchison, etc., R. Co. *v.* Crittenden, 4 Kan. App. 512.

Abstracts

FELTON.

v.

SPIRO.

(*Circuit Court of Appeals, Sixth Circuit, Feb. 2, 1897.*)

Killing of Passenger Alighting from Car—Damages—Beneficiaries—Evidence as to Number of Children.*—Under the law of Tennessee damages recovered in an action against a railroad company for the negligent killing of plaintiff's intestate are for the benefit of the family of deceased; and evidence to show the number of children left by him is admissible.

Same—Statutory Amendments.—The amendment of 1870 to sections 2291 and 2292 of the Code of Tennessee makes no change as to the beneficiaries of such actions.

Error by defendant to the Circuit Court of the United States for the Eastern District of Tennessee.
Reversed.

Chas. R. Head and Edw. Colston, for plaintiff in error.

H. H. Ingersoll, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SAGE, District Judge.

TAFT, C. J., in delivering the opinion of the court, said: "First, the court permitted the plaintiff, over the objection of the defendant, to prove the number of children the deceased left. In *Pennsylvania Co. v. Roy*, 102 U. S. 451, 460, where a plaintiff was suing a railroad company for a personal injury to himself, the supreme court held that evidence of the size of the family dependent on the plaintiff was not relevant to the issue, and was calculated to arouse undue sympathy in the minds of the jury, and to enhance the damages beyond a just sum. But, in *Railroad Co. v. Mackey*, 157 U. S. 75, 15 Sup. Ct. 491, where the action was by the administrator of one to recover damages for the death of his intestate caused by defendant's negligence, and the statute giving the right of action provided that the damages recovered should inure to the benefit of the family of the deceased, the same court held that it was entirely proper for the

*See note at end of case.

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jury, in estimating the loss suffered by those in whose behalf the suit was brought, to take into consideration the number and ages of the children. If, therefore, under the statute of Tennessee, the action by the widow is for the benefit of herself and her children, the evidence objected to was rightly admitted."

"Though the exact point here presented has never been in judgment before the supreme court of Tennessee, that court has frequently expressed the view that, where the widow sues in such a cause, she sues as trustee for herself and her children. *Greenlee v. Railway Co.*, 5 Lea, 419; *Webb v. Railway Co.*, 88 Tenn. 128, 12 S. W. 428; *Loague v. Railroad*, 91 Tenn. 461, 19 S. W. 430; *Railroad Co. v. Acuff*, 92 Tenn. 29, 20 S. W. 348; *Holder v. Railroad Co.*, 92 Tenn. 146, 20 S. W. 537. In *Railroad Co. v. Bean*, 94 Tenn. 394, 29 S. W. 370, cited by counsel for the receiver, it was held that, where the right of action had once vested in the widow, the cause of action did not pass on her death to her representative, but was extinguished. But in that case there were no children, so that the court was not required to decide, and did not in fact decide, that the widow is the only beneficiary where there are children. We find no error in the action of the court in allowing evidence as to the number and ages of the real parties in interest in the suit."

NOTE.

Death by Wrongful Act—Evidence as to Number of Children.—In *English v. Southern Pac. Co.*, (Utah, 1896) 4 Am. & Eng. R. Cas. N. S., 63 the court said: "We are equally convinced that no error was committed in allowing the plaintiff Jane English to give the names and ages of the children of the deceased, They were all parties to the action, and such testimony was proper even if they were not parties to the action, as this court held in *Pool v. Pacific Co.*, 7 Utah 303; and *Chilton v. Railway Co.*, 8 Utah 47."

When not Admissible.—The number of children can have no bearing upon the question as to what value life of deceased was to his estate; admission of such evidence is error. *Beems v. Chicago, etc., R. Co.* (Iowa) 10 Am. & Eng. R. R. Cas., 658.

The number of decedent's family is not proper to be considered by the jury as to standard of value of life of decedent. *Beems v. Chicago, etc., R. Co.* (Iowa) 6 Am. & Eng. R. R. Cas., 222.

An injured passenger is not permitted to show the number of his family and the fact that they are dependent on him for support

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for the purpose of increasing the damages. *Kreuziger v. Chicago, etc. R. Co.*, 73 Wis. 158; *Southern Pac. Co. v. Rant*, 49 Fed. Rep. 696; *Pennsylvania R. Co. v. Brooks*, 57 Pa. St. 339, 98 Am. Dec. 229; *Laing v. Colder*, 8 Pa. St. 479, 49 Am. Dec. 533.

MOBILE & O. R. Co.

v.

POSTAL TEL. CABLE Co.

(Two Cases.)

(*Supreme Court of Tennessee, April 27, 1898.*)

Condemnation—Telegraph Line along Railroad Right of Way.*—Under Shannon's Code, Tennessee, sections 1868, 1871, the land of a railroad corporation may be condemned for public purposes and internal improvements; and the construction of a telegraph line is an internal improvement within the meaning of the act.

Same—Nominal Damages.—A railroad is only entitled to nominal damages for the land along its right of way occupied by the telegraph poles, where the use of such land for telegraph purposes does not interfere with the operation of the railroad.

Same.—The provision of such act which prescribes that the jury, in assessing damages in condemnation proceedings, shall give the value of the land, without reduction, does not refer to land occupied by a railroad as its right of way.

APPEAL by defendant from Gibson county circuit court.

Appeal by defendant from Madison county circuit court. *Affirmed.*

Hays & Biggs, J. R. McIntosh, and Deason & Rankin, for appellant.

R. P. Rains, McCorry & Bond, and Caruthers & Mallory, for appellee.

BURNS

v.

CHICAGO FT. M. & D. M. RY. Co.

(*Supreme Court of Iowa, April 10, 1897.*)

Condemnation Proceedings—Damages—Error Cured by Charge.—The railroad company was not prejudiced by evidence that the condemnation of the land for its right of way would prevent the landowner from using a crossing to the use of which he was not

*For full report of case, see 8 Am. & Eng. Corp. Cas., N. S., and note, 512 *et seq.*

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entitled at the time of such proceedings, the court having charged the jury that they should not consider in arriving at a verdict that he had a right to the use of such crossing.

Appeals by Both Parties—Effect of Acceptance of Award by Landowner.—Under the law of Iowa where both parties appeal from the verdict in a condemnation proceeding and the landowner accepts, pending his appeal, the amount assessed as damages which had been paid into the hands of the sheriff by the railroad company, such acceptance is, in effect, a withdrawal of his appeal, whether or not the company knew of such acceptance; but he is not estopped from questioning the amount of recovery on the company's appeal.

APPEAL by plaintiff from Wapello county district court. *Affirmed.*

Jesse A. Baldwin and McElroy & Heindel, for appellant.

McNett & Tisdale and J. W. Lewis, for appellee.

GIVEN, J., in delivering the opinion of the court said: "We have carefully examined the authorities cited by appellant's counsel, and do not think they are in conflict with the view we have expressed. In *Railway Co. v. Byington*, 14 Iowa, 572, it was held, as has since been enacted in the statute, that the landowner accepting the amount assessed is not thereafter entitled to appeal. In *Reichelt v. Seal*, 76 Iowa, 275, 41 N. W. 16, it was held that a party cannot enforce a judgment from which he has appealed, and at the same time maintain an appeal to set it aside; but, as we have seen, this case was before the district court on defendant's appeal. In *Corwin v. Railway Co.* (Kan. Sup.) 33 Pac. 99, it was held that accepting condemnation money cured certain irregularities in the proceeding. *Peterson v. Ferreby*, 30 Iowa, 327, holds that the right of the landowner to receive the money is suspended pending an appeal. *Trust Co. v. Harless* (Ind. Sup.) 29 N. E. 1062, is not in point, as that is under a statute which does not allow the contending party to enter upon the land and to appeal from the award at the same time, as may be done under our statute when the amount of the award is deposited with the sheriff. Other cases cited seem to us equally inapplicable. Our conclusion is that the judgment of the district court is therefore affirmed."

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DANVILLE, H. & W. R. Co.

v.

KASE.

(*Supreme Court of Pennsylvania, Jan. 5, 1898.*)

Contracts with Officers—Laches—Estoppel.—In a suit by a railroad company against its former president for an accounting and discovery concerning certain of his official and personal acts, plaintiff cannot object for the first time to audits of accounts made 11 years prior to the commencement of the suit upon the ground that two of defendant's relatives were on the committee by which they were made.

Same—Contrary to Public Policy.*—A contract by an officer of a corporation, with the corporation, to furnish material for corporate purposes is not *per se* immoral or wrong; and is void only when declared contrary to public policy by statute or by decisions.

Same—Validation by Subsequent Statute.—And such a contract made in direct violation of a general statute, a provision of which made it a misdemeanor for an officer of a corporation to become a party to such a contract, could be validated, prior to the constitution of 1874 of Pennsylvania, by a special act passed subsequent to its execution.

Transactions between Corporations and Their Officers—Good Faith.—In such suit defendant could not be charged with the par value of stock received by him from the corporation, which never had a market value, and which he had turned over to plaintiff's trustee, and which had been sold at foreclosure.

Same.—Certain real estate was owned by the president of a corporation, but stood in the name of another; and the corporation, being unaware of its real ownership, authorized the president to purchase it. *Held*, that he must refund that part of the money furnished him by the company to make such purchase in excess of its true value.

Same—Unauthorized Compensation.—In such action defendant could not be credited on account of an amount claimed as compensation for his services in behalf of the corporation, there being no contract between it and himself entitling him to any compensation, and a subsequent resolution of the board of directors that he should be paid for the work performed could not render such claim valid.

Same—Limitations.—The transactions between defendant and the corporation, out of which arose mutual charges and credits, continued from 1867 until July, 1875, and the bill was filed July 1880. *Held*, that it was not error to refuse to sustain defendant's plea of the statute of limitations.

For full report of this case see 7 Am. & Eng. Corp. Cas. N. S., 679, and *foot-note*.

*As to validity of contracts of officers with corporation, see *Warren et al. v. Para Rubber Shoe Co. et al.*, (Mass.) 4 Am. & Eng. Corp. Cas., N. S., 211, and *note*, p. 220.

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APPEAL by defendant from court of common pleas, Philadelphia county. *Decree modified.*

C. Oscar Beasley and Carrie B. Kilgore, for appellant.

Crawford, Loughlin & Dallas and *Samuel Gustine Thompson*, for appellee.

In re RAILROAD CROSSING IN TOWN OF OLD ORCHARD.

(*Supreme Judicial Court of Maine, Dec. 27, 1897.*)

Use of Railroad Crossing by Public—Prescriptive Way Merged in Highway.—If a highway is located along and over a prescriptive way, the public easement in the prescriptive way becomes merged in the public easement in the highway.

Discontinuance of Highway—Loss of Public Easement.—The prescriptive way is extinguished by the location of the highway; and, if the highway is afterwards discontinued, the easement of the public in the prescriptive way is not thereby revived or restored.

Same.—And this is true, although the town within which the highway was located never took possession of the land to build or repair the way, and failed for six years to open the highway.

Same.—Where the presiding justice accordingly ruled, as a matter of law, that the public had lost its right of crossing the track of the Boston & Maine Railroad Company at the place where the "Old Salt Road," so-called, formerly was, and where the highway was laid out by the county commissioners, and discontinued in 1894; and it appeared that the Old Salt Road was a public way, established by adverse use for over 20 years; and it also appeared that the highway which was located, and afterwards discontinued, was laid out substantially along and over the Old Salt Road,—*held*, that the ruling was correct,

(Official.)

EXCEPTIONS from York county supreme judicial court. *Exceptions overruled.*

Geo. F. & Leroy Haley, for petitioners.

J. W. Symonds, D. W. Snow, and C. S. Cook, for Boston & M. R. R.

H. Fairfield and L. R. Moore, for other remonstrants.

SAVAGE, J., in delivering the opinion of the court said: "Can the public have two equivalent, but separate and distinct, rights of travel over the same land at the same time? We think not. The public easement

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in the prescriptive way was merged in the public easement in the highway. The prescriptive way was extinguished by the location of the highway. *Hancock v. Wentworth*, 5 Metc. (Mass.) 446. See, also, *Chadwick v. McCausland*, 47 Me. 342. Counsel, in support of the exceptions, denies the authority of *Hancock v. Wentworth*, *supra*, for the reason that the town of Old Orchard never opened or built the located highway, while in the case of *Hancock v. Wentworth* the way was opened and built. It is contended that the new location could not extinguish the old easement until the town took possession to build or repair; and that, if the town failed for six years to open that highway, it would be discontinued by virtue of the statute (Rev. St. c. 18, § 36); and that the original easement would remain in the public. In other words, it is claimed that the location would not take effect, so as to extinguish the easement in the prescriptive way, until the way was opened and built. We think otherwise. The location of a highway is a definite judicial act. It is made a matter of record. The time of location is certain. The rights of the public and the duties of the town become fixed from that time. The precise time of opening and building a way is, within certain limits, a matter of municipal convenience and discretion. The opening and building adds nothing to the legal effect of the location. It is true that the payment of land damages is postponed until the land "has been entered upon and possession taken for the purpose of construction or use." But this does not control the legal effect of the location. Until possession is taken by the town, the land-owner is not disturbed in the beneficial use of his property. The statute does not give the town any option about building. It is presumed that a highway duly located will be opened and built. So far as concerns the question under consideration, the way became a highway at the time of its location. It had a legal existence from that time. The location, *ex proprio vigore*, extinguished the prior easement. *Ballard v. Butler*, 30 Me. 94; *Mussey v. Union Wharf*, 41 Me. 34. Were

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the rule otherwise, it may well be questioned whether, in a case like this, where the way is actually open and passable, and is used by the public for the purposes of travel at the time of location, any formal technical act of opening is necessary. *Heald v. Moore*, 79 Me. 271, 9 Atl. 734."

CARDEN

v.

LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky, March 25, 1895.)

Action for Wrongful Killing by Railroad Company—Limitations*—Construction of Statute.—The act of 1854 of Kentucky confers a right of action upon the representatives of a person killed by a railroad company, and requires that such actions must be brought "within one year from the time of such death;" and this provision was transferred to the Chapter on Limitations of the General Statutes of Kentucky, the only alteration being that such actions are therein required to be brought "within one year after the cause of action accrued." *Held*, that this change in phraseology did not affect the time in which such action might be brought; and that the running of the statute commenced from the time of the death, and not from the appointment of decedent's administrator.

APPEAL by plaintiff from Hart county circuit court.
Affirmed.

S. M. Payton, for appellant.

H. W. Bruce, J. A. Mitchell, and *Wm. Lindsay*, for appellee.

BURMAN, J., in delivering the opinion of the court said: "Mr. Chancellor Kent, on page 142, says: 'The doctrine of an inherent equity creating an exception as to any disability, where the statute of limitation creates none, has been long, and, I believe, uniformly, exploded. General words of the statute must receive a general construction, and, if there be no express exception, the court can create none. It is a universal principle of construction that courts must find the intents of the legislature in the statute itself, and, unless some ground can be found in the statute for restraining or enlarging the meaning of its general words, they must receive a

*See note at end of case.

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general construction; that is, to read it as it is written, without any arbitrary subtraction or addition to its meaning.' See *Beckford v. Wade*, 17 Ves. 87. The statute under which this suit was instituted provides 'that actions under it must be commenced within twelve months after the cause of action shall have accrued.' There is nothing in these words which implies, in addition, the existence of a person legally competent to enforce it by suit. If it did, why, in subsequent parts of the statute, is it provided that a statute shall not run in certain cases specified, which are excepted from the operation of the statute, because the person in whose favor the cause of action exists is legally incompetent to sue? Obviously, if the term 'right of action' implies the existence of a person competent to commence an action, there was no occasion for the special provisions relieving persons not competent from the operations of the statute. Nothing further need have been said, for the courts, after having ascertained the existence of a right of action, would have next inquired whether there was any person in existence legally competent to enforce it by suit, and compute the time accordingly; and, if it was the intention to provide that the statute should only run where there is both a right of action and a person to assert it, why not insert a provision to that effect in general terms? There is no provision of the statute making the exception contended for in this case, nor do we perceive any reason why any such exception should have been made. If the cause of action does not accrue until after the death of the party who would have been entitled to sue, the persons interested in the suit have the full time allowed by the statute in which to move in the matter, to obtain a grant of administration and commence a suit. See *Tynan v. Walker*, 35 Cal. 634."

NOTE.

Action for Death by Wrongful Act—Limitations.—Under Conn. Act of 1853, giving a right of action to the personal representative of one whose death is caused by wrongful act, and requiring it to be brought within one year after the cause of action has accrued, the limitation has not run until one year from the appointment of the personal representative. *Andrews v. Hartford & N. H. R. Co.*, 34 Conn. 57.

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The two years in which an action may be brought for wrongfully causing death under the Ind. Rev. St. § 284, begin to run when death occurs, whether that be before or after a year and a day from the date of the accident. *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S. 230, 14 Sup. Ct. Rep. 579.

Under the New York Code, as well as under the act of September 1, 1880, the time between death and the issuing of letters of administration is to be reckoned as part of the time in which the action must be brought for an injury causing death. The above statutes repeal 3 N. Y. Rev. St. 733, § 9. *Greene v. New York C. & H. R. R. Co.*, 16 J. & S. (N. Y.) 333, 2 Civ. Pro. 427.

Under the Tenn. Code, § 2772, the limitation of one year begins to run from the moment of the injury, and the time between death and the qualification of a personal representative is not excluded. *Fowlkes v. Nashville & D. R. Co.*, 9 Heisk. (Tenn.) 829.

The statute of limitations begins to run only from the time of death and not from the time of the injury. So an action in Washington, brought within one year from the death of the intestate, is not barred, though the injury was received more than three years before the action was commenced. *Nestelle v. Northern Pac. R. Co.*, 56 Fed. Rep. 261.

Where the action is under the New York Act of 1847, ch. 450, as amended in 1849, ch. 256, and in 1870, ch. 78, to recover for death by wrongful act, it must be brought within two years from the time of the death. *Bonnell v. Jewett*, 24 Hun (N. Y.) 524.

The action given by N. Car. Code, § 1498, must be brought within one year after the death of the injured person. *Taylor v. Cranberry I. & C. Co.*, 94 N. Car. 525.

The provision of this statute, limiting the time within which the action must be brought, is not a statute of limitations. The statute confers a right of action which did not exist before, and it must be strictly complied with. As there is no saving clause as to the time of bringing the action, no explanation as to why it was not brought will avail. *Taylor v. Cranberry I. & C. Co.*, 94 N. Car. 525.

Under the Ohio "Act requiring compensation" for causing death by wrongful act, neglect, or default (S. & C. 1139, 1140), which gave a right of action, provided such action should be commenced within two years after the death of such deceased person, the proviso is a condition qualifying the right of action, and not a mere limitation on the remedy, and the amendment and repeal of the section containing the proviso during the existence of the right of action, and the omission of the proviso in the section as amended, did not have the effect of extending the time within which the action should have been brought. *Pittsburg, C. & St. L. R. Co. v. Hine*, 25 Ohio St. 629, 10 Am. Ry. Rep. 157.

In Wisconsin actions to recover damages for injuries from negligence, etc., causing death will not lie unless brought within the time limited by the statute which gives the right of action—viz., two years from the death of the person injured. *George v. Chicago, M. & St. P. R. Co.*, 51 Wis. 603, 8 N. W. Rep. 374.

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DENVER TRAMWAY CO.

v.

CRUMBAUGH.

(*Supreme Court of Colorado, Jan. 4, 1897.*)

Death of Street Car Conductor—Negligence of Car Repairer—Fellow Servants.*—Where the death of a street car conductor results from the failure of the company's car repairer to perform his duty, the company cannot escape liability upon the ground that they were fellow servants, they not being fellow servants under the law of Colorado.

Same—Contributory Negligence—Failure to Instruct.—It appeared that plaintiff, a conductor in the employ of defendant, a street car company, was standing on the other engaged in the performance of a duty; that the car on such track, its electrical appliances being out of repair, instead of moving forward, moved backwards, and injured plaintiff; and that there was no evidence tending to show contributory negligence on the part of plaintiff.

Held, that defendant could not complain of the court's failure to instruct as to contributory negligence, it not having been requested to do so.

Evidence to Show Notice of Defects.—It was not error in such action to admit evidence to show that such car was in a defective condition on the day prior to the accident, such evidence being competent for the purpose of showing knowledge on the part of the company of the condition of the car.

APPEAL by defendant from Arapahoe county district court. *Affirmed.*

A. M. Stevenson, for appellant.

Thomas Hartzell, Bryant & Lee, for appellee.

HAYT, C. J., in delivering the opinion of the court, said: "The evidence further shows that the electric reverse switch on car No. 110 had been out of repair for some time previous; that, on the night of the 24th day of November, 1892, the car was left at the repair shops of the company, and the persons then in charge notified that both the brake of this car and also the electric reverse switch were out of repair. Upon the following morning, to wit, the day of the accident, the car was turned out of these shops with the statement by the witness Truitt that it had been fully repaired; Truitt being at the time in the employ of the company as car repairer. The appellant presents a lengthy

*See note at end of case.

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argument to show that Truitt, who had charge of these repairs, was a co-employee with Crumbaugh in the service of the appellant company, and that for this reason the company is not liable for his neglect to properly repair the electrical appliances of this car, which neglect caused the injury complained of. It would serve no useful purpose to follow counsel through the conflicting decisions of the English and American courts upon the legal proposition contended for ; for the reason that the question has been exhaustively considered by this court in many cases, and the law is now well settled in this jurisdiction that the duty of the company to furnish reasonably safe machinery and keep the same in reasonable repair is a duty imposed by law upon the company, the performance of which it cannot delegate to another so as to relieve itself from responsibility. In the case of *Wells v. Coe*, 9 Colo. 159, 11 Pac. 50, it is said : 'Agents charged with the duty of procuring safe machinery, or agents charged with the duty of inspecting and keeping machinery and appliances in suitable repair, are not to be regarded as fellow servants with those employed to labor in the business wherein such machinery or appliances are used, or in some cases, even, with those engaged to operate the same. The master is liable for injuries resulting, without contributory negligence, to other servants, through the ordinary negligence of his employee or agent thus charged with the duty of procuring or repairing, whether such negligence be in originally failing to purchase safe machinery or appliances, or in failing to keep the same in proper condition for use.' There is no contention in this case that Crumbaugh knew of the defects in the electrical appliances on car No. 110, and there is not the slightest evidence of facts or circumstances which would indicate that he had such knowledge. When this car was run into the repair shop on the night of the 24th of November, the duty to properly repair it was a duty resting upon the company, and a duty that it could not delegate to others. The law required at the hands

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of the company reasonable diligence in making the necessary repairs, and to see to it that the car did not leave the shops for service until such repairs were actually made. It does not avail the defendant in this case that the car repairer, Truitt, swears that the car was in good condition upon the morning when it left the shops, because the jury found the fact to be otherwise, upon all the evidence. The doctrine announced in the case of *Wells v. Coe* has been reviewed and sustained by this court in a number of recent cases. *Railroad Co. v. Liehe*, 17 Colo. 280, 29 Pac. 175; *Grant v. Varney*, 21 Colo. 329, 40 Pac. 771; *Railroad Co. v. Sipes*, 23 Colo.—, 47 Pac. 287."

NOTE.

Criterion of Fellow-Service—Car Inspector as Vice-Principal.—See *note 8 Am. & Eng. R. Cas., N. S., 630*. The true rule for determining who are fellow-servants is to be determined, not from the grade or rank of the offending or injured servant, but is to be determined by the character of the act being performed by the offending servant. If it is an act that the law implies a contract duty upon the part of the employer to perform, then the offending employee is not a servant, but an agent; but as to all other acts they are fellow-servants.

Crispin v. Babbitt, 81 N. Y. 520; *Atchison, etc., R. Co. v. Moore*, 29 Kan. 632; s. c., 11 Am. & Eng. R. R. Cas. 244; *Slater v. Jewett*, 85 N. Y. 74; *Willis v. Oregon R. Co.*, 11 Oreg. 257; s. c., 17 Am. & Eng. R. R. Cas. 543; *Capper v. Louisville, etc., R. Co.*, 103 Ind. 305; s. c., 21 Am. & Eng. R. R. Cas. 525; *Indiana Car Co. v. Parker*, 100 Ind. 191; *Fuller v. Jewett*, 80 N. Y. 52.

The true test whether an employer is liable to one employee for an injury received through the negligence of another employee depends upon the character of the act performed, which causes the injury, and not upon the rank or grade of the person performing it. If it be neglect of one of the duties the employer has impliedly contracted to perform, he is liable, no matter what the rank or grade of the person he has designated to perform it, because that person is an agent and not a servant. *Galveston, H. & S. A. R. Co. v. Smith*, 44 Am. & Eng. R. Cas. 598, 76 Tex. 611, 13 S. W. Rep. 562; *Colorado Midland R. Co. v. Naylor*, 17 Colo. 501, 30 Pac. Rep. 249; *Loughlin v. State*, 105 N. Y. 159; *Ell v. Northern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 318, 1 N. Dak. 336; *Dwyer v. American Exp. Co.*, 53 Am. & Eng. R. Cas. 612, 82 Wis. 307, 52 N. W. Rep. 304.

A car inspector in failing to inspect and repair cars represents the company and is a vice-principal to that extent. *Johnson v. Chesapeake & O. R. Co.*, 36 W. Va. 73, 14 S. E. Rep. 432; *Condon v. Missouri Pac. R. Co.*, 78 Mo. 567; *King v. Ohio & M. R. Co.*, 8 Am. & Eng. R. Cas. 119, 11 Biss. (U. S.) 362, 14 Fed. Rep. 277; *Little Rock & M. R. Co. v. Moseley*, 56 Fed. Rep. 1009; *Cincinnati, H. & D. R. Co. v. McMullen*, 38 Am. & Eng. R. Cas. 165, 117 Ind. 439, 20 N. E. Rep. 287; *Brann v. Chicago, R. I. & P. R. Co.*, 53 Iowa 595, 21 Am. Ry. Rep. 184, 6 N. W. Rep. 5; *Chicago & N. W. R. Co. v. Jackson*, 55

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Ill. 492; Daniels *v.* Union Pac. R. Co., 6 Utah 357, 23 Pac. Rep. 762; Long *v.* Pacific R. Co., 65 Mo. 225; Missouri Pac. R. Co. *v.* Dwyer, 36 Kan. 58; 12 Pac. Rep. 352; Tierney *v.* Minneapolis & St. L. R. Co., 21 Am. & Eng. R. Cas. 545, 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. Rep. 229; Dewey *v.* Detroit, G. H. & M. R. Co., 53 Am. & Eng. R. Cas. 550, 16 L. R. A. 342, 52 N. W. Rep. 942; *reversed on rehearing in* 97 Mich. 329, 56 N. W. Rep. 756; *Contra.* Alabama G. S. R. Co. *v.* Carroll, 53 Am. & Eng. R. Cas. 556, 97 Ala. 126, 11 So. Rep. 803; St. Louis, I. M. & S. R. Co. *v.* Gaines, 46 Ark. 555; Seaver *v.* Boston & M. R. Co., 14 Gray (Mass.) 466; Gibson *v.* Northern C. R. Co., 22 Hun (N. Y.) 289; Little Miami R. Co. *v.* Fitzpatrick, 17 Am. & Eng. R. Cas. 578, 42 Ohio St. 318; Columbus & X. R. Co. *v.* Webb, 12 Ohio St. 475; Dewey *v.* Detroit, G. H. & M. R. Co., 97 Mich. 329, 56 N. W. Rep. 756; *reversing on rehearing*, 53 Am. & Eng. R. Cas. 550, 16 L. R. A. 342, 52 N. W. Rep. 942.

LOUISVILLE & N. R. Co.

v.

MALONE.

(Supreme Court of Alabama, Dec. 14, 1897.)

Fires Set by Engines—Combustibles Near Right of Way—Contributory Negligence.*—In an action against a railroad company for damage done to plaintiff's house by a fire started by sparks from its locomotive, defendant alleged as defense contributory negligence on the part of plaintiff in allowing dry leaves to accumulate in a valley extending from the top of his shingle roofed house in the direction of defendant's track; that such house was only 63 feet from the center of the track; and that if the fire was started by sparks from its locomotive, such leaves were first ignited. *Held*, that such defense was not sufficient.

APPEAL by defendant from Limestone county circuit court. *Affirmed.*

Thos. G. Jones, for appellant.

W. T. Sanders and *McClellan & McClellan*, for appellee.

NOTE.

Fires—Combustible Material Near Right of Way—Contributory Negligence.—In some States the owners of cultivated land contiguous to a railroad are held to be bound to keep it free from dry grass and weeds, on pain in case of fire of being held guilty of contributory negligence. Ohio & M. R. Co. *v.* Shanefelt, 47 Ill. 497; Ill. Cent. R. Co. *v.* Frazier, 47 Ill. 505; Ill. Cent. R. Co. *v.* Munn, 51 Ill. 78; Toledo, etc., R. Co. *v.* Maxfield, 72 Ill. 95; Kansas R. Co. *v.* Brady, 17 Kan. 380; Coates *v.* Mo., etc., R. Co., 63 Mo. 18; Fitch *v.* Railroad Co., 45 Mo. 322; Murphy *v.* Railroad Co., 45 Wis. 222. *Compare* Smith *v.* Hannibal, etc., R. Co., 37 Mo. 287; Fitch *v.* Pacific R. Co., 45 Mo. 322; Patton *v.* St. Louis, etc., R. Co., 87 Mo. 117; s. c., 23 Am. & Eng. R. Cas. 364; Delaware, etc., R. Co. *v.* Salmon, 38 N. J.

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L. 5; Same *v.* Same, 39 N. J. L. 299; Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223; Erd *v.* Chicago, etc., R. Co., 41 Wis. 65; McCready *v.* Railroad Co., 2 Strobb. (S. Car.) 356; Snyder *v.* Pittsburgh, etc., R. Co., 11 W. Va. 141; Pittsburgh, etc., R. Co. *v.* Hixon, 79 Ind. 111; s. c., 8 Am. & Eng. R. Cas. 717. But this rule will not apply to woodland. Chicago, etc., R. Co. *v.* Simonson, 54 Ill. 504; Kansas, etc., R. Co. *v.* Butts, 7 Kan. 308; Spaulding *v.* Chicago R. Co., 30 Wis. 110; Kessee *v.* Railroad Co., 30 Iowa, 33. Nor to buildings erected near the line of the road in dangerous contiguity to it. Phila., etc., R. Co. *v.* Hendrickson, 80 Pa. St. 182; Railroad Co. *v.* Chase, 11 Kan. 47; Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454; Burke *v.* Railroad Co., 7 Heisk. (Tenn.) 451.

An owner of land adjoining the right of way of a railroad company is not guilty of contributory negligence in failing to remove dry grass from the right of way of which he owns the fee. Pittsburgh, etc., R. Co. *v.* Jones, 86 Ind. 496; s. c., 11 Am. & Eng. R. Cas. 76.

In Phila., etc., R. Co. *v.* Hendrickson, 80 Pa. St. 182, the court say: "The conclusion from the cases is very clear that a plaintiff is not responsible for the mere condition of his premises lying along a railroad, but in order to be held for contributory negligence must have done some act or omitted some duty which is the proximate cause of his injury, concurring with the negligence of the company. Farmers may cultivate, use, and possess their farms and improvements in the manner customary among farmers, and not be bound to use unusual means to guard against the negligence of the railroad company, indeed are not bound to expect that the company will be guilty of negligence." And in Philadelphia, etc., R. Co. *v.* Schultz, 93 Pa. 341; s. c., 2 Am. & Eng. R. Cas. 271, it was held that it is not contributory negligence on the part of an owner of land along a railway to allow the accumulation of rubbish and brushwood on his property. A land-owner along a railway assumes the risk of fires necessarily following the proper and lawful use of locomotives, but there is no liability on his part to guard against their improper and unlawful use.

In Richmond & D. R. Co. *v.* Medley, 75 Va. 499; s. c., 7 Am. & Eng. R. Cas. 493, it was held that no obligation rests upon the owners of property along the line of a railway to keep it in a condition to be always safe from the fires thrown from passing engines. They are not bound to remove combustible material on their own land in order to obviate the consequences of possible or even probable negligence of the company. And in such cases there cannot be contributory negligence on the part of the owner of the property destroyed.

Sowing wheat upon right-of-way land, and failure to remove the stubble therefrom after harvesting, is not negligence *per se*. Slosson *v.* Burlington, etc., R. Co., 60 Iowa, 214; s. c., 7 Am. & Eng. R. Cas. 509.

But where plaintiff's barn stood within two feet of the line fence, and he threw out straw and manure that became very dry and took fire from a spark thrown out by the locomotive, it was held that he could not recover. Collins *v.* New York Cent. R. Co., 5 Hun (N. Y.), 499.

In a number of cases it is held that the question whether the property owner is negligent is one of fact to be determined by the circumstances of the case. Karsen *v.* Milwaukee, etc., R. Co., 29 Minn. 12; s. c., 7 Am. & Eng. R. Cas. 501; Lindsay *v.* Winona &

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St. Peter's R. Co., 29 Minn. 411; Kansas Pacific R. Co. v. Brady, 17 Kan. 380; Murphy v. Chicago, etc., R. Co., 45 Wis. 222; Ross v. Boston etc., R. Co., 6 Allen (Mass.), 87; Birge v. Gardiner, 19 Conn. 507; Ohio etc., R. Co. v. Shanefelt, 47 Ill. 497; Erie R. Co. v. Decker, 78 Pa. St. 295; Brown v. Hannibal, etc., R. Co., 37 Mo. 297; Missouri Pac. R. Co. v. Cornell, 30 Kan. 35; s. c., 11 Am. & Eng. R. Cas. 56; Kansas City, etc., R. Co. v. Owen, 25 Kan. 419; Chicago, etc., R. Co. v. Simonson, 54 Ill. 504; Murphy v. Chicago, etc., R. Co., 45 Wis. 222; Collins v. New York, etc., R. Co., 5 Hun (N. Y.), 499; Diamond v. Northern Pac. R. Co., 6 Mont. 580; s. c., 29 Am. & Eng. R. Cas. 117—130, and *note*.

DAN

v.

CITIZENS' ST. R. CO.

(Supreme Court of Tennessee, May 15, 1897.)

Death of Child on Street Car Track—Contributory Negligence of Parents.*—"Thoughtlessly" permitting a child of four years of age to wander into a place of danger is not negligence *per se* on the part of her parents.

Same—Proximate Cause.*—Where the negligence of parents in permitting their child to wander into a place of danger is the proximate cause of her death, there can be no recovery.

Same.—But where such negligence was only the remote cause of her death, which could have been prevented by the exercise of ordinary care by defendant's employees, defendant is liable.

APPEAL by plaintiff from law court of Shelby.
Reversed.

George Gantt, Jr., and L. Lehman, for appellant.
Turley & Wright, for appellee.

NOTES.

Injuries to Children—Contributory Negligence of Parents.—It is contributory negligence *per se* in parents to suffer their children to trespass on the cars or track of a railroad company. The fact that the trespass was committed without the knowledge or consent of the parents is immaterial. *Cauley v. Pittsburgh, C. & St. L. R. Co.*, 2 Am. & Eng. R. Cas. 4, 95 Pa. St. 398.

Where the mother of the injured child had no family but herself and children, and she had been accustomed to send the child to gather coal around the round-house and turntable of defendant, though she directed him otherwise on the day of the accident, it is not error to charge the jury, upon the subject of her contributory negligence, to the effect that to sustain such defense they must find a want of ordinary care on her part as a parent with respect to the cause of the injury; that her failure to use more than ordinary care in providing for the safety of her child would not defeat the action; that the burden of proof of her negligence was upon the defendant;

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that they might consider the evidence as to her condition and circumstances in determining the question as to her negligence, and that if she did not know, or have reason to know, or anticipate or fear the danger of the turntable, she was not negligent in not providing against it. *Barrett v. Southern Pac. Co.*, 48 Am. & Eng. R. Cas. 532, 91 Cal. 296, 27 Pac. Rep. 666.

Contributory negligence on the part of the parents of an injured child is not shown by mere proof that the child, but four years of age, strayed from home a distance of two blocks, and was at play with other children when injured. *Morgan v. Illinois & St. L. Bridge Co.*, 5 Dill. (U. S.) 96.

There was nothing to show negligence on the part of parents where it appeared that the child was not permitted to go upon the street unattended; that a few minutes before the accident she had been brought downstairs by her mother and seated in the dining-room, with a piece of bread in her hands, and that she had made her escape from the house by way of an open door, not exceeding five minutes before the car ran upon her and caused her death. *Weissner v. St. Paul City R. Co.*, 47 Minn. 468, 50 N. W. Rep. 606.

The negligence of the parent, to defeat his child's action for personal injuries, must be the proximate cause of the injury. *Winters v. Kansas City Cable R. Co.*, 40 Am. & Eng. R. Cas. 261, 99 Mo. 509, 12 S. W. Rep. 652, 6 L. R. A. 536. *Compare also* *South & N. Ala. R. Co. v. Donovan*, 36 Am. & Eng. R. Cas. 151, 84 Ala. 141, 4 So. Rep. 142; *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350; *Meeks v. Southern Pac. R. Co.*, 52 Cal. 602, 20 Am. Ry. Rep. 115; *Barrett v. Southern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 532, 91 Cal. 296, 27 Pac. Rep. 666; *Lake Erie & W. R. Co. v. Pike*, 31 Ill. App. 90; *Westerfield v. Levis*, 43 La. Ann. 63, 9 So. Rep. 52.

In a suit for running over a child which had strayed upon the track, it appeared that the child was seen by the officers in time to avoid the collision, but was mistaken for something else; and that by the exercise of a proper degree of care and caution they might, after first observing the object, have discovered that it was a child in time to stop the train before the accident occurred. *Held*, that in such case, although some negligence might have been attributable to those having charge of the infant, it was not the proximate cause of the casualty, and the company was liable. *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475, 9 Am. Ry. Rep. 261.

If those in charge of a street-railway car may, by the exercise of ordinary care, avoid injuring a child of very tender years, and fail to exercise such care, the question of the negligence of those having the care and custody of the child will be immaterial, and the railway company will be liable to the child directly, regardless of the negligence of those having its custody. *Chicago W. D. R. Co. v. Ryan*, 43 Am. & Eng. R. Cas. 396, 131 Ill. 474, 23 N. E. Rep. 385; *affirming* 31 Ill. App. 621; *Baltimore City Pass. R. Co. v. McDonnell*, 43 Md. 534, 14 Am. Ry. Rep. 272.

Although a child of tender years may be in the highway through the fault or negligence of his parents, and so be improperly there, yet if he be injured through the negligence of the defendant, he is not precluded from his redress. *Robinson v. Cone*, 22 Vt. 213.

See also *Slensby v. Milwaukee St. Ry. Co.* (Wis.), 9 Am. & Eng. R. Cas., N. S., 527, and *note*, p. 532.

Upon the question whether the contributory negligence of the

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parents in permitting a child of tender years to go at large is imputable to the child and will bar his recovery for personal injuries, there is a conflict of authority. That such contributory negligence of the parents is fatal to the child's recovery is the rule in *California, Illinois, Indiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, and New York*. *Schierhold v. North Beach R. Co.*, 40 Cal. 447; *Chicago, etc., R. Co. v. Gregory*, 58 Ill. 226; *Chicago, etc., R. Co. v. Becker*, 76 Ill. 25, 84 Ill. 482; *Evansville, etc., R. Co. v. Wolf*, 59 Ind. 89; *Jeffersonville R. Co. v. Bowen*, 40 Ind. 545; s. c., 49 Ind. 154; *Lafayette, etc., R. Co. v. Huffman*, 28 Ind. 287; *Brown v. European, etc., R. Co.*, 58 Me. 384; *McMahon v. N. C. R. Co.*, 39 Md. 439; *Lovett v. Salem, etc., R. Co.*, 9 Allen (Mass.), 557; *Mulligan v. Curtis*, 100 Mass. 512; *Fitzgerald v. St. Paul, etc., R. Co.*, 29 Minn. 336; s. c., 8 Am. & Eng. R. Cas. 310; *Grethen v. Chicago, etc., R. Co. (C. C.)* 19 Am. & Eng. R. Cas. 342; *Meyer v. Midland R. Co.*, 2 Neb. 319; *Hartfield v. Roper*, 21 Wend. (N. Y.) 615; *Mangam v. Brooklyn, etc., R. Co.*, 38 N. Y. 456; *Lehman v. Brooklyn*, 29 Barb. (N. Y.) 234.

In *Pennsylvania* it has been held that it is contributory negligence *per se* in parents to suffer their children to trespass on the cars or track of a railroad company. The fact that the trespass was committed without the knowledge or consent of the parent is immaterial. *Cauley v. Pittsburgh, etc., R. Co.*, 95 Pa. St. 398; s. c., 2 Am. & Eng. R. Cas. 4. In this case, while some boys were playing on a sand-laden car standing on a switch within the city limits, the train was moved and the conductor ordered the boys off. The youngest, a boy of seven years, in jumping off, fell under the wheels and was injured. At the trial of the suit, the plaintiff offered to prove the above facts and others showing negligence by defendant's servants. *Held*, that the offers were properly refused, and a verdict properly directed for defendant. See, also, 98 Pa. St. 49; s. c., 4 Am. & Eng. R. Cas. 533, where the reargument of the same case is reported. *Compare Kay v. Penna. R. Co.*, 65 Pa. St. 269; *P. & R. R. Co. v. Long*, 75 Pa. St. 257.

Where the child was only in his seventh year, and was engaged, at the time the accident happened which caused his death, in furnishing water to the conductors and drivers upon defendant's cars, with the knowledge and consent of the plaintiff, his mother, *held*, that it was contributory negligence, *per se*, on the part of the plaintiff to suffer her child to engage in so dangerous an employment, and that a non-suit was properly entered. *Smith v. Hestonville, etc., R. Co.*, 92 Pa. St. 450; s. c., 2 Am. & Eng. R. Cas. 12.

It is held, however, that such contributory negligence on the part of the parent is not imputable to the child, and is not a bar to the child's recovery for injuries sustained through the negligence of the company. This is the rule in *Pennsylvania, Missouri, Connecticut, Virginia, Ohio, and Alabama*. *Kay v. Pa. R.*, 65 Pa. St. 269; *Smith v. O'Connor*, 48 Pa. St. 218; *Phila. R. Co. v. Long*, 75 Pa. St. 257; *Frick v. St. Louis, etc., R. Co.*, 75 Mo. 542; *C. H. & H. R. Co. v. Moore*, 59 Tex. 64; s. c., 10 Am. & Eng. R. Cas. 745; *Daley v. N. & W. R.*, 26 Conn. 591; *Birge v. Gardiner*, 19 Conn. 507; *Norfolk, etc., R. Co. v. Ormsby*, 27 Gratt. (Va.) 455; *Bellefontaine R. Co. v. Snyder*, 18 Ohio St. 399; *Cleveland, etc., R. Co. v. Manson*, 30 Ohio, 451; *Government St. R. Co. v. Hanlon*, 53 Ala. 70; *St. L., etc., R. Co. v. Freeman*, 36 Ark. 41; s. c., 4 Am. & Eng. R. Cas. 608.

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Negligence of Parents—Question for Jury.—Whether the parent has exercised due care in looking after the child, is ordinarily a question of fact for the jury. *McGeary v. Eastern R. Co.*, 135 Mass. 363; s. c., 15 Am. & Eng. R. Cas. 407; *Lynch v. Smith*, 104 Mass. 53; *Ihl v. Forty-second St., etc., R. Co.*, 47 N. Y. 307; *Cosgrove v. Ogden*, 49 N. Y. 255; *Prendergast v. N. Y. C., etc., R. Co.*, 58 N. Y. 652; *Penna. R. Co. v. Lewis*, 79 Pa. St. 33; *P., A. & M. R. Co. v. Pearson*, 72 Pa. St. 169; *Dahl v. Milwaukee City R. Co. (Wis.)*, 19 Am. & Eng. R. Cas. 121.

Negligence of Poor Parents.—It has been held that poor parents of infants are not guilty of contributory negligence in failing to prevent them from straying upon the railroad track. *P. & R. R. v. Long*, 75 Pa. St. 257; *Penna. Co. v. James*, 81½ Pa. St. 194; *P., A. & M. R. Co. v. Pearson*, 72 Pa. St. 169; *Kay v. Penna. R. Co.*, 65 Pa. St. 269; *Walters v. C., R. I., etc., R. Co.*, 41 Iowa 71; *Isabel v. H. & St. J. R.*, 60 Mo. 475; *Hoppe v. Chicago, M. & St. P. R. Co.*, 61 Wis. 357; s. c., 19 Am. & Eng. R. Cas. 74.

When the parents of an infant are unable to give him their personal care and intrust him to the supervision of a suitable person, the negligence of the latter cannot be imputed to the parent, and will not defeat a recovery for negligence resulting in the death of the infant. *Walters v. C., R. I., etc., R. Co.*, 41 Iowa 71. See, however, *Hogan's Petition*, 7 Cent. L. J. 311-313. *Patterson on Railway Accident Law*, p. 77 & 2 Redfield R. Cas. 501, where this doctrine is criticised.

DOUGLASS

v.

KANAWHA & M. RY. CO.

(*Supreme Court of Appeals of West Virginia, Dec. 11, 1897.*)

Injury to Stock—Service of Summons.—In an action against a railroad company to recover damages for killing a horse, the summons may be served upon a depot or station agent in the actual employment of the company, residing in the county or township wherein the action is brought; and the return of an officer showing that such process has thus been served is sufficient.

Allegations of Corporate Existence.*—In an action against a railroad company, it is not necessary to aver in the declaration, nor is it necessary to prove on the trial, that the defendant is a corporation, unless with the plea there is filed an affidavit denying that it is. The court will *ex officio* take notice of the fact.

(Syllabus by the Court.)

APPEAL by plaintiff from Mason county circuit court.
Affirmed.

Geo. S. Couch, for appellant.

John E. Beller and *Chas E. Hogg*, for appellee.

ENGLISH, P., in delivering the opinion of the court, said: "Counsel for the plaintiff in error, in their brief,

*See note at end of case.

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suggest that it is nowhere alleged in the pleadings that it is a corporation, and it is not claimed there was any evidence of this fact. Was it necessary to allege that it was a corporation? This question was before the court of appeals of Virginia in the case of *Baltimore & O. R. Co. v. Sherman's Adm'x*, 30 Grat. 602, and it was there held that 'in an action against a railroad company it is not necessary to aver in the declaration, nor is it necessary to prove on the trial that the defendant is a corporation, unless with the plea there is filed an affidavit denying that it is. The court will *ex officio* take notice of the fact.' And so we hold. For these reasons, the judgment complained of is affirmed, with costs, etc."

NOTE.

Actions Against Railroads—Pleading Corporate Existence.—An averment of defendant's corporate existence is necessary in every count of a complaint against a corporation. *People v. Central Pac. R. Co.*, 41 Am. & Eng. R. Cas. 653, 83 Cal. 393, 23 Pac. Rep. 303.

The designation of the defendant in the complaint as "The Cincinnati, Hamilton and Indianapolis Railroad Company" sufficiently indicates that the defendant is a corporation. *Cincinnati, H. & I. R. Co. v. McDougall*, 108 Ind. 179, 8 N. E. Rep. 571; *O'Donald v. Evansville, I. & C. S. L. R. Co.*, 14 Ind. 259; *Root v. Illinois C. R. Co.*, 29 Iowa 102. *Adams Exp. Co. v. Harris*, 40 Am. & Eng. R. Cas. 151, 120 Ind. 73, 21 N. E. Rep. 340.

The almost universal practice in suits against railway companies is to allege the corporate capacity of the defendant. It would seem that if the provision of the statutes on the subject does not positively require such allegation it contemplates such mode of procedure. *Galveston, H. & S. A. R. Co. v. Smith*, 81 Tex. 479, 17 S. W. Rep. 133.

A corporation should sue and be sued by its true name, and if it is sued by its true name it is not necessary to show in the declaration how it was incorporated, or to aver in the declaration that it is a corporation duly constituted, or that it is authorized by law to sue or be sued in its corporate name; but these questions may be put in issue by defendant, or raised upon the trial of the general issue. *Hart v. Baltimore & O. R. Co.*, 6 W. Va. 336.

HUBER

v.

BROWN *et al.**(Supreme Court of Washington, April 6, 1897.)*

Killing of Stock on Track—Jurisdiction of Supreme Court.—In an action to recover damages for the killing of stock by a railroad company the complaint was amended on motion of plaintiff, without objection from defendant, by striking out paragraphs claiming double damages under certain sections of Laws 1893 of Washington,

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which had been declared unconstitutional. *Held*, that the amount in controversy not exceeding \$200, the appeal must be dismissed by the supreme court.

APPEAL by defendant from Whatcom county superior court. *Dismissed*.

Kerr & McCord, Carr & Preston, and W. R. Bell, for appellants.

Jeremiah Neterer, for respondent.

GORDON, J., in delivering the opinion of the court, said: "The complaint was evidently drafted under chapter 128 of the Laws of 1893, section 3 of which provides for the recovery of double damages, and section 4 for attorney's fees. These sections of the act were held unconstitutional in *Jolliffe v. Brown*, 14 Wash. 155, 44 Pac. 149. At the trial of the cause below, and while the jury was being impaneled, plaintiff's counsel moved the court to dismiss from the complaint paragraphs 5 and 6, and to wholly disregard the same, and announced that no testimony would be introduced in support of said paragraphs because of the decision in *Jolliffe v. Brown, supra*. Counsel also stated that 'the only recovery sought in the action is the value of the stock alleged to have been killed, and claimed in the sum of \$135,' and asked that 'the prayer of said complaint be so modified as to correspond with the value of said stock, to wit, the sum of \$135.' Paragraphs 5 and 6 of the complaint contained allegations entitling plaintiff to double damages and attorney's fees, under sections 3 and 4 of the act already referred to. In charging the jury, the court expressly told them that plaintiff's recovery could not exceed \$135.'

"No objection was made by appellants to plaintiff's motion striking these paragraphs from the complaint, or amending the prayer for judgment, and upon the trial no objection was made to plaintiff's evidence in support of an action to recover the actual damages sustained. It is apparent, therefore, that the amount in controversy does not exceed the sum of \$200, within the meaning of section 4 of article 4 of the constitution of this state. *Gabriel v. Railway Co.*, 7 Wash. 515, 35 Pac. 410; *Henry v. Railway Co.* (decided Feb. 5, 1897) 47 Pac. 895. The appeal is dismissed."

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Brown *v.* Louisville, etc., R. Co. (Ky.), 55.

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Ejection.

A conductor has a right to eject a person from his car whose sole claim to be considered a passenger is by virtue of a ticket void on its face.

McGhee *v.* Reynolds, (Ala.), 49.

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Hamilton *v.* Pittsburg, etc., R. Co. (Pa.), 70.

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Brown *v.* Louisville, etc., R. Co. (Ky.), 55.

Exemplary damages where malice is shown.

Smith *v.* Philadelphia, W. & B. R. Co. (Md.), 264.

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Southern Ry. Co. *v.* Hardin (Ga.), 250.

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Missouri, K. & T. Ry. Co. *v.* Turley (C. C. A.), 380.

Freight Trains.

Liability of railroad company for injury to passenger on freight train.

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Fright but no bodily injury.

Lehigh & H. Ry. Co. *v.* Marchant (C. C. A.), 748.

Injury to passenger by sudden starting of train.

Louisville, etc., R. Co. *v.* Hale (Ky.), 73.

Injury to passenger through failure to repair depot platform.

Fullerton *v.* Fordyce *et al.* (Mo.), 729.

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Winship *v.* New York, N. H. & H. R. R. (Mass.), 275.

Res Gestae.

Statement of intention to become a passenger by party killed by defendant's locomotive.

Chicago & E. I. R. Co. *v.* Chancellor (Ill.), 842.

CAR TRUST LEASES.

Receivers.

Lessor entitled to reasonable compensation for use of stock by receiver of company.

Platt *v.* Philadelphia & R. Co. *et al.* (C. C. A.), 169.

Receiver's assumption of obligations by use of leased rolling stock.

Platt *v.* Philadelphia & R. Co. *et al.* (C. C. A.), 169.

CATTLE GUARDS.

Injuries of stock, duty to construct cattle guards.
Atchison, T. & S. F. R. Co. v. Billings (Kan.), 740.

CHILDREN.

Children running in front of moving street car.
Perry v. Macon Consol. St. Ry. Co. (Ga.), 819.
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Southern Ry. Co. v. Covenia (Ga.), 551.
 Evidence to show number of children of deceased.
Felton v. Spiro (C. C. A.), 865.
 Imputable negligence.
Dan v. Citizens' St. R. Co. (Tenn.), 880.
 Obstruction near track of street railway and failure to signal.
Perry v. Macon Consol. St. Ry. Co. (Ga.), 819.

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Actions for injuries where accident occurred in foreign state.
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Liability for damage of goods through negligence of connecting carrier, notice to contracting carrier.
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CONSTITUTIONAL LAW.

Action to enjoin officers from enforcing certain rates on the ground that they are unconstitutional, is not an action against the state within the

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meaning of the eleventh amendment.

Smyth, Attorney General et al. v. Higginson, et al. (U. S.), 1.

A railroad is a person within the meaning of the fourteenth amendment of the constitution of the United States.

Smyth, Attorney General et al. v. Higginson, et al. (U. S.), 1.

Authority of state to establish unreasonable rates.

Smyth, Attorney General et al. v. Higginson, et al. (U. S.), 1.

Enjoining state officer from enforcing certain rates of transportation upon the ground that the statute prescribing them is repugnant to the constitution of the United States.

Smyth, Attorney General et al. v. Higginson, et al. (U. S.), 1.

Impairment of obligation of contracts where the contract is between railroads and cities.
Chicago, B. & Q. R. Co. v. State of Nebraska (U. S.), 423.

Municipal Corporations.

An act is not unconstitutional because it delegates to the city council the authority to apportion the burden of repairing such viaduct among the several railroad companies using the viaduct.

Chicago, B. & Q. R. Co. v. State of Nebraska (U. S.), 423.

Nebraska act of 1893 governing the rates to be charged by railroads held unconstitutional.

Smyth, Attorney General et al. v. Higginson et al. (U. S.), 1.

Rates.

And the law of Iowa providing for the punishment of common carriers for fixing dis-

CONSTITUTIONAL LAW— CONTRIBUTORY NEGLIGENCE—Continued.

criminating rates is constitutional.

Blair *v.* Sioux City & P. Ry. Co. (Iowa), 306.

State cannot require railroad to be operated without profits within its limits, merely upon the ground that the company earns sufficient on its interstate business to give it just compensation in respect of its entire line.

Smyth, Attorney General *et al.* *v.* Higginson, *et al.* (U. S.), 1.

The basis of all calculations as to reasonableness of rates to be charged by a railroad company must be a fair value of the property used by it for the convenience of the public.

Smyth, Attorney General *et al.* *v.* Higginson *et al.* (U. S.), 1.

CONTRIBUTORY NEGLIGENCE.

Child killed on track.

Pletcher *v.* Scranton Traction Co. (Pa.), 715.

Children running in front of moving street car.

Perry *v.* Macon Consol. St. Ry. Co. (Ga.), 819.

Crossings.

A railroad company is not responsible for injuries received by a person who unsuccessfully attempts to cross the track in advance of a train which he knows is approaching the place of crossing.

Burnett *v.* Eastern & A. R. Co. (N. J.), 469.

Boy catching his foot between improperly constructed rails when attempting to cross.

Goodrich *v.* Burlington, C. R. & N. Ry. Co. (Iowa), 719.

Cars obstructing view at crossing.

Louisville, N. A. & C. Ry. Co. *v.* Patchen (Ill.), 852.

Liability of railroad company where it fails to give sig-

nals, but deceased might have seen train.

State To Use of Price *et al.* *v.* Cumberland & P. R. Co. (C. C. A.), 511.

Plaintiff's foot caught in hole in planking between defendant's tracks.

Baltimore & O. R. Co. *v.* Anderson (C. C. A.), 497.

Where evidence showed that deceased, in broad daylight, without looking out for cars, apparently absorbed in meditation, stepped from a bridge upon defendant's track.

Stewart *v.* New York, N. H. & H. R. Co. (Mass.), 520.

Whether crossing before moving train is negligence *per se.*

Chicago & W. I. R. Co. *v.* Ptacek (Ill.), 481.

Deaf and dumb persons.

Beem *v.* Tama & T. Electric Railway & Light Co. (Iowa), 610.

Deaf and dumb persons.

Thompson *v.* Salt Lake Rapid Transit Co. (Utah), 563.

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Henderson *v.* Detroit Citizens' St. Ry. Co. (Mich.), 812.

Fall from platform while waiting for train.

Missouri K. & T. Ry. Co. *v.* Turley (C. C. A.), 380.

Fires Set by Locomotives.

Matthews *v.* Missouri Pac. Ry. Co. (Mo.), 673.

Due care of plaintiff's employees.

Richmond *et al.* *v.* McNeill (Ore.), 691.

Frightening Horses.

Blowing whistle beneath bridge.

Mitchell *v.* Nashville, C. & St. L. Ry. Co. (Tenn.), 775.

Injury to person on track.

Evans *v.* Lake Erie & W. R. Co. (Ind.), 837.

CONTRIBUTORY NEGLIGENCE—Continued.**Instructions.**

Denver & R. G. R. Co. *v.* Spencer *et al.* (Colo.), 536.

Master and Servant.

Employee injured on track.
St. Jean *v.* Boston & M. R. Co. (Mass.), 444.

Obstruction near track of street railway and failure to signal.
Perry *v.* Macon Consol. St. Ry. Co. (Ga.), 819.

Parent and Child.

Death of child on street car track.

Dan *v.* Citizens' St. R. Co. (Tenn.), 880.

Passenger attempting to cross track near a passenger train and was killed by another train.

Chicago & E. I. R. Co. *v.* Chancellor (Ill.), 842.

Permanent Injuries.

Subsequent contributory negligence.

Fullerton *v.* Fordyce (Mo.), 729.

Plaintiff attempting to cross a street stopped on defendant's track, when gong was rung by an approaching train, instead of crossing track stepped backwards and fell into a manhole. It was held that the fall was the result of failure to use care.

Lumis *et al.* *v.* Philadelphia Traction Co. (Pa.), 847.

Pleading.

Alabama G. S. R. Co. *v.* Burgess (Ala.), 836.

Street Railways.

Death on street railway tracks.
Blaney *v.* Electric Traction Co. (Pa.), 560.

Taking seat upon track behind a curve after being warned of danger.

Roseberry's Admr. *v.* Newport News & M. V. R. Co. (Ky.), 844.

Trespassers.

Reidel *v.* Philadelphia, W. & B. R. Co. (Md.), 91.

CONVERSION.

Carriers of goods.

Downing *et al.* *v.* Outerbridge (C. C. A.), 861.

CORPORATIONS.

Contract with officers.

Danville, H. & W. R. Co. *v.* Kase (Pa.), 869.

Pleading.

Allegation of corporate existence.

Douglass *v.* Kanawha & M. Ry. Co. (W. Va.), 883.

Transactions between corporations and officers.

Danville H. & W. R. Co. *v.* Kase (Pa.), 869.

COUPONS.

Interest on matured coupons.

Fox *v.* Hartford & W. H. H. R. Co. (Conn.), 456.

Negotiability of over-due coupons.

Fox *v.* Hartford & W. H. H. R. Co. (Conn.), 456.

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Whether coupons pass with the bond.

Fox *v.* Hartford & W. H. H. R. Co. (Conn.), 456.

CROSSINGS.

Attempting to cross before moving street car.

Blaney *v.* Electric Traction Co. (Pa.), 560.

Care to be exercised by drivers of vehicles to avoid accidents.

Central R. Co. of New Jersey *v.* Smalley (N. J.), 463.

Contributory Negligence.

A railroad company is not responsible for injuries received by a person who unsuccessfully attempts to cross the track in advance of a train which he knows is approaching the place of crossing.

Burnett *v.* Eastern & A. R. Co. (N. J.), 469.

Attempting to cross street at railroad crossing, after the

CROSSINGS—Continued.

- gates were raised, immediately in the rear of a departing train, which obstructed plaintiff's view, and he was injured by a backing train upon the opposite tracks.
 Ellis *v.* Boston & M. R. R. (Mass.), 490.
- Boy catching his foot between improperly constructed rails when attempting to cross.
 Goodrich *v.* Burlington, C. R. & N. Ry. Co. (Iowa), 719.
- Cars obstructing view at crossing.
 Louisville, N. A. & C. Ry. Co. *v.* Patchen (Ill.), 852.
- Province of court and jury, 856.
- Liability of railroad company where it fails to give signals, but deceased might have seen train.
 State To Use of Price *et al v.* Cumberland & P. R. Co. (C. C. A.), 511.
- Plaintiff's foot caught in hole in planking between defendant's tracks.
 Baltimore & O. R. Co. *v.* Anderson (C. C. A.), 497.
- The negligence of a foot passenger in making such use of railroad tracks while a train is approaching from a short distance will not excuse the company if he was seen, or would have been seen had there been a look-out on the engine, in time to avoid injuring him.
 Baltimore & O. R. Co. *v.* Anderson (C. C. A.), 497.
- Where evidence showed that deceased, in broad daylight, without looking out for cars, apparently absorbed in meditation, stepped from a bridge upon defendant's track.
 Stewart *v.* New York, N. H. & H. R. Co. (Mass.), 520.
- Whether crossing before mov-

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- ing train is negligence *per se*.
 Chicago & W. I. R. Co. *v.* Ptacek (Ill.), 481.
- Duty of company to repair track.
 Baltimore & O. R. Co. *v.* Anderson (C. C. A.), 497.
- Louisville & N. R. Co. *v.* Smith (C. C. A.), 506.
- Evidence that highway antedated construction of railroad.
 Sutton *v.* Chicago, etc. R. Co. (Wis.), 100.
- Foot of plaintiff's horse caught in dangerous hole in roadbed resulting in his being thrown out of vehicle and injured.
 Louisville & N. R. Co. *v.* Smith (C. C. A.), 506.
- Foot passengers are entitled to use railroad tracks as a crossing of an intersecting street.
 Baltimore & O. R. Co. *v.* Anderson (C. C. A.), 497.
- Frightening horses.
 Flaherty *v.* Harrison (Fla.), 176.
- Highways.
- Duty of railway as to leaving highway in good condition.
 Sutton *v.* Chicago, etc., R. Co. (Wis.), 100.
- Railroad's right to compensation where street is constructed across its right of way.
 Paterson, N. & N. Y. R. Co. *v.* Mayor, etc., of city of Newark (N. J.), 182.
- Injury to boy while crossing in front of moving street car.
 Henderson *v.* Detroit Citizen's St. Ry. Co. (Mich.), 812.
- Look and listen.
 Central R. Co. of New Jersey *v.* Smalley (N. J.), 463.
- Presumption of negligence.
 Moon *v.* Fink *et al.* (Ga.), 848.
- Signals.
 Louisville & N. R. Co. *v.* Ward's Adm'r, (Ky.), 544.
- A finding that the statutory signals were not given at a crossing, not being sustain-

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ed by the evidence, was erroneous.

Sutton *v.* Chicago, etc., R. Co. (Wis.), 100.

Speed.

Louisville, N. A. & C. Ry. Co. *v.* Patchen (Ill.), 852.

Running a railroad train at a country crossing at the rate of 40 miles an hour is not negligence *per se*.

Sutton *v.* Chicago, etc., R. Co. (Wis.), 100.

Stop, Look, and Listen.

McCanna *v.* New England R. Co. (R. I.), 485.

Obstructed view, 463.

Streets.

Railroad's right to compensation where street is constructed across its right of way.

Paterson, N. & N. Y. R. Co. *v.* Mayor, etc., of City of Newark (N. J.), 182.

The negligence of a foot passenger in making such use of railroad tracks while a train is approaching from a short distance will not excuse the company if he was seen, or would have been seen had there been a lookout on the engine, in time to avoid injuring him.

Baltimore & O. R. Co. *v.* Anderson (C. C. A.), 497.

Use of railroad crossings by the public.

In re Railroad Crossing in town of Old Orchard (Me.), 870.

DAMAGES.

See Eminent Domain.

Exemplary Damages.

Benefit accruing to adult children from mother's life.

Chicago, & W. I. R. Co. *v.* Ptacek (Ill.), 481.

Carriers of Goods.

By a special contract the price of the goods at the point of

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shipment may be made the measure of damages for their subsequent loss through the carrier's negligence; and the fact that no invoice price was made out and agreed upon at the time the goods were shipped is immaterial.

Pierce *v.* Southern Pac. Co. (Cal.), 88.

Measure of damages for loss of goods.

Downing *et al v.* Outerbridge (C. C. A.), 861.

Death by wrongful act, measure of damages.

Louisville & N. R. Co. *v.* Ward's Adm'r (Ky.), 544.

Death of child.

Southern Ry. Co. *v.* Covenia (Ga.), 551.

Excessive damages.

Denver & R. G. R. Co. *v.* Spencer *et al.* (Colo.), 536.

Fire Set by Locomotives.

Matthews *v.* Missouri Pac. Ry. Co. (Mo.), 673.

Opinion as to value of property.

Matthews *v.* Missouri Pac. Ry. Co. (Mo.), 673.

Funeral expenses.

Southern Ry. Co. *v.* Covenia (Ga.), 551.

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Blair *v.* Sioux City & P. Ry. Co. (Iowa), 306.

St. Louis, O. H. & C. Ry. Co. *v.* Fowler (Mo.), 405.

Live stock, injuries to.

Atchison, T. & S. F. R. Co. *v.* Billings (Kan.), 740.

Measure of damages in Colorado for death.

Denver & R. G. R. Co. *v.* Spencer *et al.* (Colo.), 536.

Mental and physical suffering.

Louisville & N. R. Co. *v.* Sander's Adm'r (Ky.), 528.

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Whether claim for damages for killing stock on track bears interest.

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DEATH BY WRONGFUL ACT

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Action by next of kin.

Boyden *v.* Fitchburg R. Co. (Vt.), 523.

Administrator's right to maintain suit where county court has set aside, all parties agreeing, an order admitting a will to probate.

Louisville & N. R. Co. *v.* Sander's Adm'r (Ky.), 528.

Damages for benefit of decedent.

Felton *v.* Spiro (C. C. A.), 865.

Evidence to show number of children of deceased.

Felton *v.* Spiro (C. C. A.), 865.

Expectation of pecuniary benefit by next of kin.

Boyden *v.* Fitchburg R. Co. (Vt.), 523.

Instantaneous killing of person on track, statutory cause of action.

Matz *et al.* *v.* Chicago & A. R. Co. (Mo.), 592.

Killing of workman on track.

St. Louis & S. F. Ry. Co. *et al.* *v.* Miles (C. C. A.), 585.

Killing person sleeping on track.

Parish *v.* Western & A. R. Co. (Ga.), 574.

DECLARATIONS.**Master and Servant.**

Declarations of employees while acting within the scope of their authority.

Atchison, T. & S. F. R. Co. *v.* Consolidated Cattle Co. (Kan.), 368.

DIRECTION OF VERDIOT.**Contributory negligence.**

Henderson *v.* Detroit Citizens' St. Ry. Co. (Mich.), 812.

DISCRIMINATION.**Abutting Owners.**

Necessity of consent to regulations as to use of street and construction, maintenance and operation of road.

State *v.* Commissioners of Streets (N. J.), 323.

DRUNKENNESS.

See Carriers of Passengers.

EASEMENTS.

Right to lay water pipes on land of grantor.

Montana Ore Purchasing Co. *v.* Boston & M. Consol. Copper & Silver Min. Co. *et al.* (Mont.), 754.

Use of railroad embankment as reservoir dam.

Montana Ore Purchasing Co. *v.* Boston & M. Consol. Copper & Silver Min. Co. *et al.* (Mont.), 754.

EJECTION.

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ELECTRIC RAILWAYS.

Due care as to foot passengers.

Thompson *v.* Salt Lake Rapid Transit Co. (Utah), 563.

Evidence of negligence of motorman.

Thompson *v.* Salt Lake Rapid Transit Co. (Utah), 563.

ELEVATED RAILWAYS.

Abutting owners' right to compensation.

Philips *v.* Philadelphia & R. T. R. Co. (Pa.), 706.

ELEVATED RAILWAYS — EMINENT DOMAIN—Contin'd.
Continued.

Care owed to person boarding car.

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Defective platform.

Barth *v.* Kansas City El. Ry. Co. (Mo.), 281.

Eminent domain.

Philips *v.* Philadelphia & R. T. R. Co. (Pa.), 706.

Open gates as an invitation to the public.

Barth *v.* Kansas City El. Ry. Co. (Mo.), 281.

ELEVATORS.

Injuries to employee through defective elevator.

McNee *v.* Coburn Trolley Track Co. (Mass.), 765.

EMINENT DOMAIN.

Admissions.

Introduction of evidence of an assessment list made by one joint owner in which the land was valued by him at a certain sum.

St. Louis, O. H. & C. Ry. Co. *v.* Fowler (Mo.), 405.

Appointment of commissioners.

State *v.* Ocean City R. Co. (N. J.), 421.

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Paterson N. & N. Y. R. Co. *v.* Mayor, etc., of City of Newark (N. J.), 182.

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Elevated railroads.

Philips *v.* Philadelphia & R. T. R. Co. (Pa.), 706.

Error in instruction as to damages.

Mobile & O. R. Co. *v.* Postal Tel. Cable Co. (Tenn.), 867.

Evidence.

Admissions of one joint owner as to value of land.

St. Louis, O. H. & C. Ry. Co. *v.* Fowler (Mo.), 405.

Sale of other lands.

St. Louis, O. H. & C. Ry. Co. *v.* Fowler (Mo.), 405.

Where the tract of land sought to be condemned lies contiguous to a manufacturing city and is suitable for manufacturing purposes the jury in estimating damages may consider the value of switching facilities to the remainder of the land, though there was no evidence of an offer or agreement by plaintiff to permit or provide switch connections with its track.

St. Louis, O. H. & C. Ry. Co. *v.* Fowler (Mo.), 405.

Special benefits, what are.

St. Louis, O. H. & C. Ry. Co. *v.* Fowler (Mo.), 405.

Street Railways.

Condemnation of tracks of one company to the use of another company.

Colonial City Traction Co. *v.* Kingston City R. Co. (N. Y.), 327.

Taking real property for railroad purposes.

Board of Education *v.* Kanawha & M. R. Co. (W. Va.), 767

Telegraph Companies.

Telegraph line along railroad right of way.

Mobile & O. R. Co. *v.* Postal Tel. Cable Co. (Tenn.), 867.

ESTOPPEL.

Streets.

The fact that both plaintiff and defendant own lands abutting on a street by titles derived through mesne conveyances from the same source does not estop defendant from occupying such street for railroad purposes,

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such fact not establishing contractual relations between plaintiff and defendant.

Bond v. Pennsylvania Co. (Ill.), 118.

EVIDENCE.

See Declarations.

Eminent Domain.

Defects.

Denver Tramway Co. v. Crumbaugh (Colo.), 875.

Medical experts.

Lehigh & H. Ry. Co. v. Marchant (C. C. A.), 648.

EXECUTION.

Sale of franchise under execution.

Simmons et al. v. Worthington et al. (Mass.), 771.

EXEMPLARY DAMAGES.

Carriers of Passengers.

Ejection where malice is shown.

Smith v. Philadelphia, W. & B. R. Co. (Md.), 264.

Failure to stop at destination.
Southern Ry. Co. v. Hardin (Ga.), 250.

Death by wrongful act.

Louisville & N. R. Co. v. Ward's Adm'r (Ky.), 544.

When not warranted.

Louisville & N. R. Co. v. Sander's Adm'r (Ky.), 528.

FELLOW SERVANTS.

Burden of proof.

Hunter v. Kansas City & M. Railway & Bridge Co. (C. C. A.), 620.

Conductor and brakeman.

Walker et al. v. Gillett (Kan.), 140.

General liability.

Nolan v. New York, N. H. & H. R. Co. (Conn.), 637.

Liability for incompetency of fellow servant.

Parker v. New York Cent. & H. R. R. Co. (N. Y.), 614.

Presumption as to whether ser-

FELLOW SERVANTS — Continued.

vants are fellow servants or vice principals.

Hunter v. Kansas City & M. Railway & Bridge Co. (C. C. A.), 620.

Railroad employee injured while boarding a car which was moving round on a turntable, assumes the risk, whether he is injured through his own want of ordinary care or the act of a fellow servant.

St. Louis, I. M. & S. Ry. Co. v. Ferguson (Kan.), 634.

Street car conductor and car repairer.

Denver Tramway Co. v. Crumbaugh (Colo.), 875.

Vice Principals.

Walker v. Gillett (Kan.), 140;
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FIRE INSURANCE.

Fire set by locomotive.

Matthews v. Missouri Pac. Ry. Co. (Mo.), 673.

FIRES SET BY LOCOMOTIVES.

Accumulation of grass on right of way as negligence.

Richmond et al. v. McNeill (Ore.), 691.

Admissibility of evidence showing that a spark subsequently fell upon a tent standing upon the ground where the barn which had been burned stood.

Matthews v. Missouri Pac. Ry. Co. (Mo.), 673.

Contributory Negligence.

Matthews v. Missouri Pac. Ry. Co. (Mo.), 673.

Due care of plaintiff's employees.

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Damages.

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- Opinion as to value of property.
 Matthews *v.* Missouri Pac. Ry. Co. (Mo.), 673.
 Presumption of negligence.
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 Sufficiency of evidence as to negligence.
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FIRES SET BY RAILROADS.

- Admissibility of evidence of other fires.
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- Assignee of purchaser as party to proceedings.
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- Sale of franchises under execution.
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FREIGHT.

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FREIGHT TRAINS.

- Carriers of Passengers.**
 Liability of railroad company for injury to passenger on freight train.
 Heywood *v.* Boston & A. R. Co. (Mass.), 260.

FRIGHTENING HORSES.

- Blowing whistle beneath bridge.
 Mitchell *v.* Nashville, C. & St. L. Ry. Co. (Tenn.), 775.
Contributory Negligence.
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 Flaherty *v.* Harrison (Wis.), 176.

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HIGHWAYS.**Crossings.**

- Duty of railway as to leaving highway in good condition.
 Sutton *v.* Chicago, etc., R. Co. (Wis.), 100.
 Public loss in right at crossing.
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 Paterson, N. & N. Y. R. Co. *v.* Mayor, etc., of City of Newark (N. J.), 182.
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- Children.**
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INJUNCTION.**Abutting Owners.**

- Use of streets for car tracks.
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Veatch *v.* American Loan & Trust Co. (C. C. A.), 795.

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Enjoining state officers in a United States court from enforcing certain rates.

Smyth, Attorney General et al. v. Higginson, et al. (U. S.) 1.

Justices of the Peace.

In the absence of legislative enactment a justice of the peace has no authority to determine the rate of freight charges of a railroad corporation.

Norfolk & Western Ry. Co. v. Pinnacle Coal Co. (C. C. A.) 358.

Nebraska act of 1893 governing the rates to be charged by railroad held unconstitutional. *Smyth, Attorney General et al. v. Higginson, et al.* (U. S.), 1.

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The fact that both plaintiff and defendant own lands abutting on a street by titles derived through mesne conveyances from the same source does not estop defendant from occupying such street for railroad purposes, such fact not establishing contractual relations between plaintiff and defendant.

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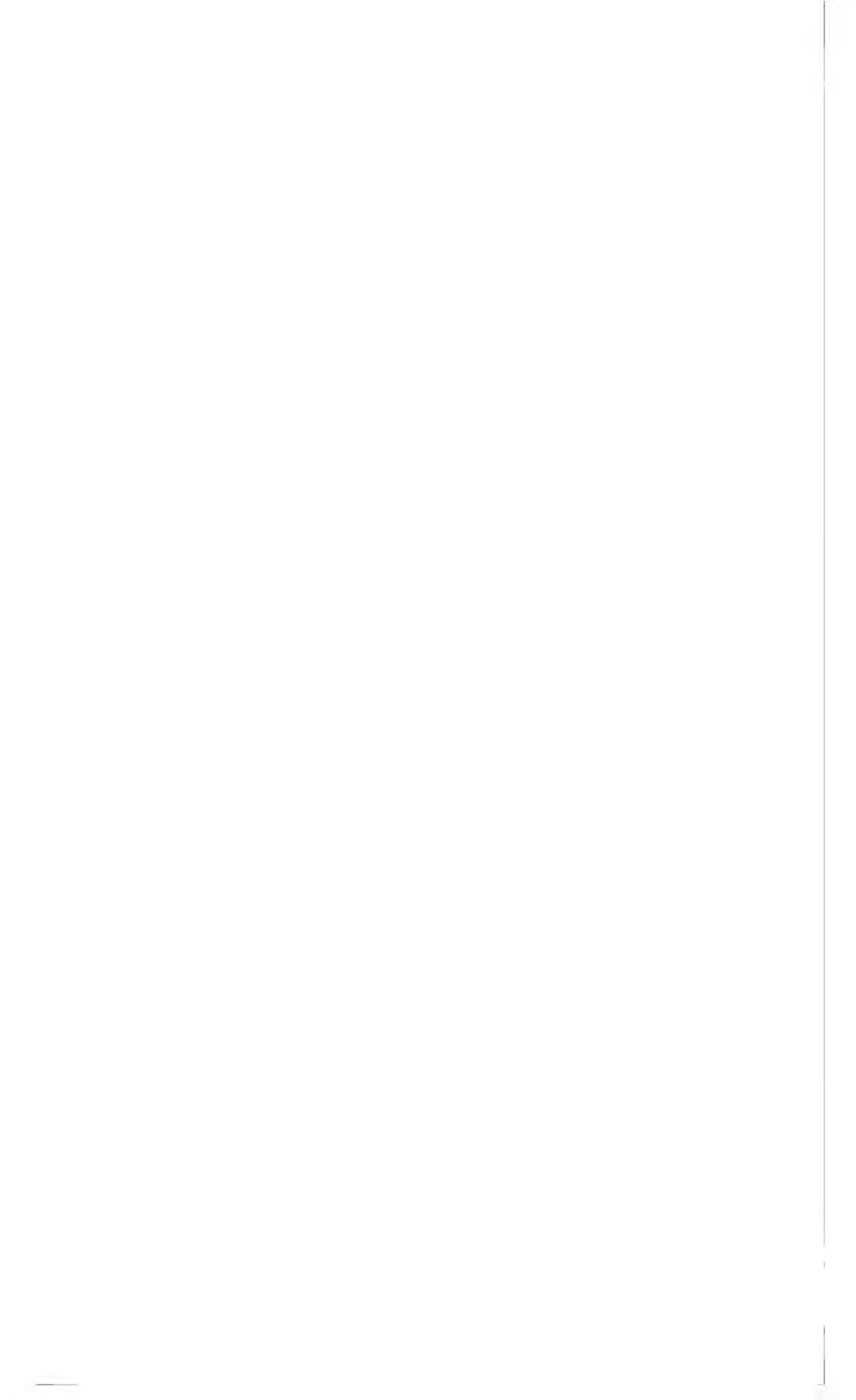
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